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FEDERAL COMMUNICATIONS COMMISSION

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INDEX

	Page
Amateur Repeater Stations; docket No. 20073 (FCC 74–579)	149
Azalea Corp. et al.; docket No. 17555 et al. (FCC 74R–206)	151
Azalea Corp. et al.; docket No. 17555 et al. (FCC 69D–25)	163
Cable Television Procedures; amendment of part 76 (FCC 74–553)	182
Centaur Broadcasting, Inc., et al.; file No. BMPH–13601 et al. (FCC 74–568)	184
Colorado West Broadcasting, Inc., et al.; docket No. 19588 et al. (FCC 74R–207)	190
FM Table of Assignments; docket No. 19561 (FCC 74–560)	198
FM Table of Assignments; docket No. 20070 (FCC 74–558)	200
FM Table of Assignments; docket No. 19708 (FCC 74–559)	203
Garden of the Gods Broadcasting Co.; notice of apparent liability for forfeiture (FCC 74–571)	208
General Television of Oscoda; file No. CAC–2134 (FCC 74–554)	211
Gulf Coast-Bellaire Cable Television; file No. CAC–1684 (FCC 74–552)	214
Houma Cablevision, Inc.; file No. CAC–2295 (FCC 74–567)	217
H.R.H., Inc.; notice of apparent liability for forfeiture (FCC 74–599)	219
Hulman, Anton, Jr., et al.; file No. CTAX–21 et al. (FCC 74–525)	222
International Record Carriers' Communications; docket No. 19660 (FCC 74–565)	225
Kaiser Broadcasting Co.; file No. BPCT–4688 (FCC 74–557)	229
Limited Coast Stations; docket No. 20072 (FCC 74–578)	233
Monitoring Stations Listings; amendment of section 0.121(c) (FCC 74–544)	236
Muskegon Cable TV Co.; file No. CAC–2853 (FCC 74–566)	237
North American Communications Corp.; file No. BPTI–1759 et al. (FCC 74–570)	239
N-Triple-C, Inc.; file No. 4240–C1–TC–(128)–74 (FCC 74–585)	241
Ohio ETV Network Commission; file No. 6090–6096–PL–104X et al. (FCC 74–564)	244
Pleasant Broadcasting Co. et al.; docket No. 18594 et al. (FCC 74–576)	248
Prime Time Access Rule; request for waiver by stations WKRC–TV and WKEF–TV re 1974 football season (FCC 74–586)	250
RCA Alaska Communications, Inc.; docket No. 20050 (FCC 74–513)	254
RCA Global Communications, Inc.; et al.; file No. 13–DSS–P–71 et al. (FCC 74–583)	256
Rollins Cablevision; file No. CSR–337 et al. (FCC 74–555)	258
Signaling Communications; docket No. 19939 (FCC 74–550)	261
Thousand Islands Corp.; notice of apparent liability for forfeiture (FCC 74–598)	264
Universal Television Cable System, Inc.; file No. CAC–3047 et al. (FCC 74–551)	267
Vega Baja Broadcasting Corp.; file No. BP–19486 (FCC 74–556)	269
V.I. Industries, Inc.; notice of apparent liability for forfeiture (FCC 74–597)	271
Western Union Telegraph Co.; file No. 2–DSS–L–74 (FCC 74–584)	274
WWKY, Inc., et al.; docket No. 19748 et al. (FCC 74D–26)	277

FCC 74-579

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 97 OF THE COMMISSION'S RULES TO PERMIT LINKING OF AMATEUR REPEATER STATIONS	Docket No. 20073 RM-2349

NOTICE OF PROPOSED RULEMAKING

(Adopted June 5, 1974; Released June 7, 1974)

BY THE COMMISSION: COMMISSIONER QUELLO NOT PARTICIPATING.

1. Notice of Proposed Rule Making in the above entitled matter is hereby given.

2. The Commission has under consideration a petition (RM-2349) filed by the American Radio Relay League (ARRL). Petitioner requests the Commission to issue an Order deleting § 97.89(c) of the rules. This section now prohibits more than two repeater stations being operated in tandem, i.e., one station repeating the transmission of the other, except for emergency operations.

3. The ARRL claims a formal rule making proceeding is unnecessary in this matter, citing § 553(b) of the Administrative Procedures Act and § 1.412(c) of the Commission's Rules, as authority to support their position. Pursuant to those subsections, general notice of proposed rule making must be published except in certain limited instances. Petitioner does not show that the proposed rule deletion comes within those exceptions.

4. In support of the requested deletion, the ARRL offers the following claims and arguments:

A. Some amateur radio organizations planning to develop networks of repeater stations for use in times of disasters are unwilling to implement their plans unless the networks can also be used for other amateur operations.

B. In the more sparsely populated areas of the country, linked repeater stations can provide more reliable communications than can operation in the high frequency amateur bands.

C. In the more densely populated areas of the country, linking of repeater stations is neither necessary nor desired by amateurs, and the privilege of linking would be self-limiting.

5. Our findings, as stated in the Report and Order in Docket 18803, 37 FCC 2d 225 (1972), upon review of the comments filed in that Docket, are that amateur repeater stations are useful for increasing the range of VHF and UHF vehicular and handheld mobile stations in conducting intra-community amateur radio communications, and for effecting emergency radio communications which possibly could not

104-041—74

otherwise be conducted on the amateur bands. Also, in the interests of spectrum conservation, we found the majority of situations could be accommodated with a maximum of two linked repeaters. In practice, these findings have been verified through information filed with applications for repeater stations. The vast majority of repeaters use considerably less effective radiated power than is permitted, indicating most amateur repeater stations are intended for local, or intra-community, use. No specific instance of even two linked repeaters for general amateur radio communications has come to our attention. However, this aspect would not normally come to our attention. We are inclined to agree with the ARRL that the prohibition is unnecessary, since in more densely populated areas, amateurs apparently do not desire to link to repeater stations. In the less densely populated areas, spectrum conservation is not as critical as elsewhere.

6. Therefore, we propose to delete § 97.89(c), as shown in the Appendix.

7. The specific rule changes proposed herein are set forth in the attached Appendix. Authority for these proposed amendments is contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended.

8. Pursuant to applicable procedures set forth in § 1.415 of the Commission's Rules, interested persons may file comments on or before September 18, 1974, and reply comments on or before October 2, 1974. In accordance with the provisions of § 1.419(b) of the Commission's Rules, an original and fourteen copies of all statements, briefs, and comments filed shall be furnished the Commission. All relevant and timely comments and reply comments will be considered by the Commission before final action is taken. The Commission may also take into account other relevant information before it, in addition to specific comments invited by this Notice. Responses will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters in Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

Part 97 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

§ 97.89 [Amended]

Section 97.89, par (c), is deleted and designated as [Reserved].

FCC 74R-206

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of AZALEA CORP., MOBILE, ALA.	Docket No. 17555 File No. BP-17340
MOBILE BROADCAST SERVICE, INC., MOBILE, ALA. For Construction Permits	Docket No. 17558 File No. BP-17478

APPEARANCES

Theodore Baron, on behalf of Azalea Corporation; *Rainer K. Kraus* and *Herbert D. Miller, Jr.*, on behalf of Mobile Broadcast Service, Inc.; and *Charles W. Kelley*, on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted June 4, 1974; Released June 7, 1974)

BY THE REVIEW BOARD: BERKEMEYER, PINCOCK, AND KESSLER.

1. This proceeding involves the mutually exclusive applications of Azalea Corporation (Azalea) and Mobile Broadcast Service, Inc. (Mobile) to construct a new Class III standard broadcast station to operate on the frequency 960 kHz, 1 Kw, daytime only, at Mobile, Alabama.[1] The applications were designated for hearing on various issues, including financial and *Suburban* issues, by Commission Memorandum Opinion and Order, 32 FR 10685, 10 RR 2d 717, released July 13, 1967. In an Initial Decision, FCC 69D-25, released April 22, 1969, Administrative Law Judge Chester A. Naumowicz concluded that, with the exception of Azalea, which had failed to meet its burden of proof under the *Suburban* issue specified against it, the applicants were fully qualified, and recommended a grant of the Mobile application under the standard comparative issue. Each applicant and the Broadcast Bureau filed exceptions to the Initial Decision and oral argument was held before a panel of the Review Board on February 17, 1970.

2. After oral argument, but prior to the issuance of a Review Board Decision, the Commission on March 6, 1970, issued a statement concerning *Community Survey Showings in Connection with Radio and*

[1] Originally, this proceeding also involved the applications of People's Progressive Radio, Inc. (People's), for a new station, and W.G.O.K., Inc., the licensee of Class II standard broadcast station WGOK, for authority to modify its present facilities. By Order, FCC 73M-296, released March 6, 1973, the Presiding Judge dismissed People's application for failure to prosecute. On February 1, 1974, the Review Board adopted an Order (FCC 74R-40, released February 5, 1974) dismissing WGOK's application at the applicant's request.

Television Applications, 22 FCC 2d 421, 18 RR 2d 1923, which had the effect of staying a final decision by the Board during pendency of the *Primer* inquiry in Docket No. 18774. On February 23, 1971, the Commission released its Report and Order adopting the *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650, 21 RR 2d 1507, and stated that applicants in pending hearing cases may amend their *Suburban* showings. 27 FCC 2d at 680, 21 RR 2d at 1539. Azalea filed an amendment to its *Suburban* showing on May 24, 1971, and Mobile filed a similar amendment on February 2, 1972. By Memorandum Opinion and Order, 38 FCC 2d 95, 25 RR 2d 975, released November 24, 1972, the Review Board accepted both amendments, but stated that the *Suburban* showings of both applicants failed to comply with the requirements of the *Primer* and remanded the proceeding to the Administrative Law Judge for issuance of a Supplemental Initial Decision under the existing *Suburban* issue as well as a Rule 1.65 issue against Azalea.[2]

3. In a Supplemental Initial Decision, FCC 73D–34, released June 21, 1973, Judge Naumowicz concluded that Azalea must be disqualified under the *Suburban* and Rule 1.65 issues; that Mobile has sustained its burden of proof under the *Suburban* issue; and that Mobile must be preferred over WGOK under the standard comparative issue. Exceptions and a request for oral argument were filed by Azalea, exceptions, briefs in support thereof, and requests for oral argument were filed by W.G.O.K., Inc. (WGOK),[3] and the Broadcast Bureau; and replies were filed by Mobile and Azalea. Oral argument was held before a panel of the Review Board on April 4, 1974. Briefly, Mobile, WGOK, and the Broadcast Bureau support the Judge's disqualification of Azalea. However, Azalea, WGOK, and the Broadcast Bureau, contend, contrary to the Judge's conclusion, that Mobile must also be disqualified for failure to meet its burden of proof under the *Suburban* issue. We have reviewed the Initial Decision and Supplemental Initial Decision in light of the exceptions and replies, the arguments of the parties, and our examination of the record. We find the Administrative Law Judge's findings of fact to be substantially accurate and complete and his conclusions with respect to Azalea supported by the findings. Therefore, except as modified herein and in our rulings on exceptions contained in the attached Appendix, the Judge's findings and conclusions as they relate to these matters are adopted. However, we do not agree with the Judge's conclusion that Mobile met its burden of proof under the *Suburban* issue. In light of our disagreement with the Judge's conclusions regarding Mobile's *Suburban* showing, and the position of the parties challenging Mobile's showing, we believe that some discussion is warranted.

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[2] The site availability issue specified against People's in the same Order is now moot (see note 1, *supra*).

[3] Since the Board has dismissed WGOK's application (see note 1, *supra*), its exceptions will be considered only insofar as they relate to the basic qualifications of the two remaining applicants.

AZALEA CORPORATION

A. Suburban Issue

4. In its remand Order, *Supra*, the Board stated that Azalea's May 24, 1971, *Suburban* amendment (see paragraph 2, *supra*) failed to satisfy the requirements of the *Primer* in the following areas: (1) only one black community leader was contacted, although the 1970 black populations of the city of Mobile and Mobile County were over 35% and 32% of their respective populations, and Azalea proposed black-oriented programming; (2) Azalea provided almost no information as to how the surveys were designed and conducted; (3) Azalea failed to relate the broad categories derived from its leadership survey, *i.e.*, "crime", "poverty" and "civil rights", to the specific needs and interests of Mobile; and (4) Azalea failed to particularize what programs were designed to meet the specific problems ascertained.[4] At the hearing, Azalea did not offer any new evidence under the *Suburban* issue and did not offer its *Suburban* amendment of May 24, 1971, into evidence. The Presiding Judge concluded that since the record contained no more evidence than was contained in the original record, he must affirm his earlier conclusion, as set forth in the original Initial Decision (paragraphs 56–57) that Azalea had failed to satisfy the *Suburban* issue and consequently failed to establish its basic qualifications. In its exceptions, Azalea argues that the *Primer* "constitutes guidelines in appropriate cases only"; that Azalea determined in advance of any surveys that a black-oriented station would serve the public interest; that the "public interest" standard of Section 309(a) of the Communications Act of 1934, as amended, cannot be limited by the *Primer;* and that "the Primer may not lawfully—in the public interest—be applied mechanistically to Azalea's application."

5. Initially, the Board believes that Azalea's argument regarding the applicability of the *Primer* must be rejected. There is no question that an applicant's failure to ascertain the needs of its proposed service area in the manner set forth in the *Primer* will result in its absolute disqualification. See *Voice of Dixie, Inc.*, 45 FCC 2d 1027, 29 RR 2d 1127 (1974);[5] *Frank M. Cowles*, 37 FCC 2d 405, 25 RR 2d 475 (1972), review denied FCC 73–877, released August 22, 1973; *Harry D. Stephenson*, 33 FCC 2d 749, 23 RR 2d 760 (1972), review denied FCC 73–877, released August 22, 1973. Since Azalea did not introduce its May 24, 1971, amendment into evidence, the only question remaining is whether its original record *Suburban* showing complies with the requirements of the *Primer*. The Board is of the view that Azalea's *Suburban* showing, even when viewed in its most favorable light, fails

[4] See paragraph 6 of the Board's remand Order, *supra*, 38 FCC 2d at 98–99, 25 RR 2d at 980–981.

[5] In *Voice of Dixie, Inc.*, the Commission denied an application for a new FM broadcast station in Birmingham, Alabama, because the applicant failed to meet its burden under a *Suburban* issue. In particular, the applicant failed to: (a) utilize principals, management level employees or prospective management level employees to interview community leaders; (b) interview all significant groups within the community of license; (c) interview community leaders outside the principal city of license; and (d) utilize principals, employees, prospective employees or a professional research organization to conduct its survey of the general public. The Commission stated that the applicant "failed to heed the explicit instructions of the *Primer* in the face of our long-standing and consistent policy of considering such a failure to ascertain the needs of a proposed service area properly to be a disqualifying factor. . . ." 45 FCC 2d at 1031, 29 RR 2d at 1131.

to comply with the requirements of the *Primer*.[6] Azalea did not provide any demographic or socio-economic data regarding the composition of its proposed service area (see *Primer*, Q. & A. 9), and, consequently, did not demonstrate that the community leaders it interviewed were representative of all significant groups within the community (see *Primer*, Q. & A. 13(a)). In addition, Azalea did not submit a survey of members of the general public (see *Primer*, Q. & A. 4, 13 (b)); did not consult with community leaders outside Mobile, Alabama, the community of license (see *Primer*, Q. & A. 6 & 7); did not list its ascertained community problems (see *Primer*, Q. & A. 22); and did not correlate its ascertained problems with proposed programming (see *Primer*, Q. & A. 29). These are all fatal defects, and any one, standing alone, would be sufficient to disqualify the applicant. Without the required demographic showing and a listing of ascertained problems, we are unable to determine whether the individuals actually contacted by Azalea are representative of significant groups in the Mobile community or whether the programming proposed by Azalea adequately deals with community problems. In light of the above, we must conclude that Azalea failed to meet its burden under the *Suburban* issue, and thus failed to establish its basic qualifications to be a Commission licensee. See *Voice of Dixie, Inc., supra. Cf. Henry* v. *FCC*, 112 U.S. App. D.C. 257, 302 F.2d 191, 23 RR 2016, cert. denied 371 U.S. 821 (1962).

B. Rule 1.65 Issue

6. In its remand Order, *supra*, the Board specified a Rule 1.65 issue against Azalea because it failed to amend its application to report the death of Dr. Francis F. England, a 20.83% Azalea stockholder, but not an officer or director, who died on September 16, 1971. In addition, Azalea did not advise the Commission of the disposition of his stock interest. At the hearing, Azalea did not dispute these facts and offered no evidence on the matter. The Judge concluded that Azalea's failure to introduce evidence regarding the disposition of Dr. England's stock constituted a failure to carry its burden of proof under the Rule 1.65 issue which necessitates disqualification since the record was totally silent as to the ownership of some one-fifth of Azalea's stock.[7] Azalea argues solely that the Judge erred in failing to adopt Azalea's proposed findings that the death of Dr. England need not be reported. The Review Board, however, fully agrees with the Judge's conclusion that Azalea's failure to inform the Commission (a) of the ultimate disposition of Dr. England's stock, which

[6] Azalea's record showing consists primarily of the opinion of Charles E. Trainor, Azalea's president, that a black-oriented station would serve the needs and interests of Mobile's black populace. Azalea did, however, conduct a "special survey" of a "cross-section" of members of the community which consisted of contacts with a Mobile city commissioner, a state senator, an Internal Revenue Service employee, a businessman and a religious leader who was also the president of the Alabama NAACP. In addition, Azalea's program format was approved by the Executive Committee of the Mobile Chapter of the NAACP, which, according to Dr. R. W. Gilliard, the Chapter's president and Azalea's vice-president, represented all levels of the black community. Finally, Azalea proposed fifteen programs to meet its ascertained needs which included agricultural, religious and informational programming, directed primarily to a black audience.

[7] The Judge also concluded that the death of Dr. England did not have to be reported since "by implication the death of a stockholder such as Dr. England, who was not the basis of either preference or demerit need not be reported," citing the Commission's Report and Order in Docket 14867 (*Reporting of Changed Circumstances*) 29 FR 15516, 3 RR 2d 1622 (1964), which states that an applicant shall report any substantial change in ownership or legal status such as the "death of a principal who is important to an application as a grounds for a preference or as a basis for a demerit." 3 RR 2d at 1624.

amounted to approximately 20% of Azalea's stock, and (b) of the successor, *i.e.*, administrator, executor, or assignee, constitutes a significant violation of Rule 1.65 which establishes a lack of basic qualification. Thus, Azalea's failure to update its application precludes appropriate Commission authorities from determining whether the administrator, executor, or assignee possesses the qualifications to be a stockholder of a broadcast licensee. For example, if an appropriate amendment had been filed reporting Dr. England's successor, all parties including the Commission's Broadcast Bureau would have had an opportunity to review the information concerning the successor's basic qualifications (*i.e.*, citizenship, financial, etc.). If that successor did not meet statutory basic qualifications, all parties would have had an opportunity also to challenge his qualifications. Since Azalea, however, chose instead to file nothing concerning Dr. England's successor and by so doing violated Section 1.65, it is evident that the choice it did make results in its application becoming fatally defective. Therefore, in our view, Azalea must be disqualified (a) for failing to meet the requirements of the *Primer* and failing to meet its burden under the Rule 1.65 issue, and (b) for permitting its application to become fatally defective.

MOBILE BROADCAST SERVICE

Suburban Issue

7. The Review Board, in its remand Order, *supra*, noted that Mobile's February 2, 1972 *Suburban* amendment suffered "from several key deficiencies". In particular, the Board pointed out that Mobile failed to: (a) submit a detailed demographic and socio-economic profile of its proposed community of license; [8] and (b) adequately correlate its proposed programming with its ascertained problems. 38 FCC 2d at 99, 25 RR 2d at 981. The Presiding Judge concluded that Mobile had submitted an adequate profile of the community it proposed to serve; that Mobile's community leaders included a "representative sample of the community"; that Mobile had adequately determined the needs of outlying areas outside of Mobile, Alabama; that Mobile had adequately correlated its proposed programming with ascertained needs; and that Mobile had fully satisfied the Commission's *Suburban* requirements. The Board, however, agrees with Azalea, WGOK and the Broadcast Bureau that Mobile's *Suburban* showing is deficient in several significant respects. In our view, these deficiencies, when viewed in light of the Commission's recent decision in *Voice of Dixie, Inc., supra*,[9] clearly demonstrate that Mobile has failed to meet the

[8] The Board noted that, without such analysis, "it is not clear that the various groups contacted by the applicant constitute a representative cross-section of the specified community." 38 FCC 2d at 99, 25 RR 2d at 981.

[9] On April 8, 1974, Mobile filed a motion for acceptance of memorandum of law and a memorandum of law in which it attempts to distinguish the Commission's decision in *Voice of Dixie, Inc., supra*, from the instant proceedng. On April 16, 1974, the Broadcast Bureau filed an opposition to the motion arguing that acceptance of the motion would set an undesirable precedent and that *Voice of Dixie, Inc.*, mandates a denial of Mobile's application: On April 25, 1974, Mobile filed a reply to the Bureau's opposition and on April 29, 1974, the Bureau filed a motion to strike Mobile's reply. We have analyzed the arguments of both parties relating to our acceptance of the memorandum and find some merit in the Bureau's position. However, in the interests of a fair and complete hearing, we believe that Mobile's memorandum of law should be considered. Accordingly, Mobile's motion will be granted, the memorandum of law accepted, and the Bureau's motion to strike denied. For the reasons stated hereinafter, however, the Board believes that the principles enunciated by the Commission in *Voice of Dixie, Inc.*, are clearly applicable to the instant case.

Suburban issue specified against it, and, thus, has failed to establish its basic qualifications to be a Commission licensee.

8. *Contacts with Significant Groups.* First, the record shows that Mobile failed to contact leaders from all significant groups within its proposed city of license as required by the *Primer*, Q. & A. 16,[10] since Mobile intentionally omitted Mobile city commissioners and ignored representatives of the manufacturing industry. These omissions, in our view, render Mobile's entire *Suburban* showing fatally defective. See *Voice of Dixie, Inc., supra.* With respect to Mobile's omission of Mobile city commissioners, Mobile's demographic data identified the city commissioners as three officials who are elected for four year terms and, while in office, each commissioner serves as mayor for at least one year. (Mobile Exhibit 33, p. 4.) According to Mobile, these officials were not interviewed because Mobile's principals were well aware of their views and desired to interview other leaders who could provide a different perspective on community problems.[11] The Review Board, however, does not agree with Mobile that it had no obligation to attempt to interview any Mobile city commissioners, the highest elected public officials in the city of Mobile, Alabama, who can reasonably be expected to be more cognizant of the diversity and scope of Mobile's governmental problems than any other group. Mobile's alleged familiarity with the "views" of the city commissioners constitutes no substitute for the required interviews relating to community problems and needs, *per se*, particularly under the circumstances here where Mobile has not indicated that the views of the city commissioners were considered by Mobile in compiling its list of community problems or in designing its proposed programming.[12] In this regard, it is to be noted that we do not question, as a matter of form, Mobile's decision to classify "government" as a significant group within its proposed city of license, in lieu of "city commissioners" and various departments and agencies, etc. However, the *Primer*, Q. & A. 16 (see note 10, *supra*) explicitly and unequivocally states, as a matter of substance, that an applicant's omission of leaders of a significant group in its community would render the applicant's *Suburban* showing "defective". In the Board's view, there is no question, as a matter of substance, that the Mobile city commissioners are the most significant governmental leaders in the city of Mobile; indeed, this fact was recognized by Mobile itself.[13] Moreover, while it appears that the applicant did contact some governmental officials, including an elected

[10] Q. & A. 16 of the *Primer* provides:

Question: Is a showing on the ascertainment of community problems defective if the leaders of one of the groups that comprise the community, as disclosed by the applicant's study, are not consulted?

Answer: The omission of consultations with leaders of a significant group would make the applicant's showing defective since those consulted would not reflect the composition of the community. [27 FCC 2d at 684, 21 RR 2d at 1545.]

[11] On cross-examination, Mobile's vice-president, Howard Smith, testified that some of the principals of Mobile have been at odds with the city commissioners even though they have been trying to work with the commissioners and that he was "fairly well aware of their viewpoint and they have become fairly well aware of my viewpoint." Smith also testified that Mobile's decision not to interview any city commissioners was not influenced by th fact that Mobile had substantial differences of opinion with the commissioners, but rather because he was aware of their opinions and their opinions were well presented "to the exclusion of many opposing opinions in the Mobile area." (Tr. 3240–41.)

[12] Howard Smith testified that he did not believe that the views of the city commissioners were represented in Mobile's survey. (Tr. 3241.)

[13] Smith testified that the city commissioners were the "highest elected officials" and that they were "elected leaders". (Tr. 3241.)

county commissioner, Mobile has not shown that any of these officials were in a position to have as broad a perspective of the governmental problems of the city of Mobile as would its city commissioners. For all of these reasons, Mobile's failure to consult with the city commissioners constituted a deliberate failure to consult with the significant leaders of a group within Mobile's proposed city of license. See *Voice of Dixie, Inc., supra.*[14]

9. Regarding Mobile's omission of representatives of the manufacturing industry, Mobile's own demographic data indicates that in 1970, approximately 25,000 persons were employed in manufacturing out of a total non-agricultural employment force of 105,000 persons in the Mobile SMSA.[15] (Mobile Exhibit 31, p. 8.) In addition, 1970 U.S. Census Data, of which the Board will take official notice, indicates that 18,473 persons were engaged in manufacturing out of a total 88,002 employed persons sixteen years and over. Mobile concedes that it did not consult with any representatives of the manufacturing industry, as such, but argues that it contacted "persons involved in the business and industrial affairs of the community."[15] Mobile's own evidence shows that the manufacturing industry constitutes a significant group in the Mobile, Alabama, area and we fail to see how Mobile's survey was representative of "the business and industrial affairs of the community" without including representatives from the manufacturing industry. See *Voice of Dixie, Inc., supra.* See also note 14, *supra.* Mobile's failure to consult with Mobile city commissioners and representatives of the manufacturing industry cannot be deemed inconsequential since, in *Voice of Dixie, Inc., supra*, the Commission stated that the language of Q. & A. 16 of the *Primer* (see note 10, *supra*) is "unequivocal" and that an applicant's failure to consult with representatives of a significant group would render the applicant's survey defective.

10. *Contracts Outside the City of Mobile.*[17] Next, the Review Board

[14] In *Voice of Dixie, Inc.*, First Security and Exchange Company (First Security), whose application was denied, interviewed community leaders who were "generally representative of employers in the community", including bankers, contractors and small businessmen. The applicant did not, however, interview representatives of the city's two largest employers. The Commission stated: "While we do not specifically require an applicant to survey all employers or even all major employers in a given community, we cannot understand how First Security's survey was generally representative of employers and large industry in the face of these significant omissions, particularly when there is no showing that representatives of other significant similar large employers or dominant industries were surveyed." 45 FCC 2d at 1030, 29 RR 2d at 1130. Likewise, in light of Mobile's failure to interview city commissioners, we fail to see how its survey of governmental leaders was representative of governmental leaders in Mobile, Alabama.

[15] Agricultural employment amounted to only 2,300 persons.

[15] These contacts included interviews with bankers, retail store owners, insurance executives and a member of the State Industrial Advisory Board. However, the record does not explain the functions of the State Industrial Advisory Board nor does it support the inference, as argued by Mobile, that a member of the Board would be familiar with the problems of the manufacturing industry either in the State of Alabama or in Mobile, Alabama.

[17] We do not agree with Mobile's argument that since the Review Board did not specify any deficiencies in Mobile's contacts outside the City of Mobile in its remand Order, *supra*, this matter was outside the scope of the remand hearing. In its remand Order, the Board pointed out deficiencies in Mobile's *Suburban* amendment of February 2, 1972 and remanded the proceeding for further hearing under the *Suburban* issue specified by the Commission in its designation Order. (See paragraph 2, *supra.*) However, the Board never stated or implied that the remaining parts of Mobile's *Suburban* showing were adequate; compare *Cosmos Broadcasting Corp.*, 41 FCC 2d 255, 259, 27 RR 2d 1209, 1213 (1973), review denied FCC 74–247, released March 20, 1974. Nor did the Board specify a limited type of *Suburban* issue. (See *Lefiore Broadcasting Company, Inc.* (*WSWG–AM*), FCC 74–441, —— FCC 2d ——, released May 2, 1974; *Great Southwest Media Corporation*, FCC 74R–182, —— FCC 2d ——, released May 21, 1974.) Instead, a general and broad issue was specified, and on remand, Mobile's entire *Suburban* showing was in issue. Moreover, Mobile was clearly on notice that other parties were challenging this aspect of its *Suburban* showing.

is of the view that Mobile's contacts with community leaders outside the City of Mobile were insufficient to enable Mobile to obtain a "broad overview of community problems" as required by the *Primer*, Q. & A. 7.[18] Mobile argues that its contacts outside the City of Mobile included numerous county officials and other persons who "had substantial contacts with activities outside the City of Mobile." [19] In its application, Mobile indicated that it intended to serve "Mobile, Alabama, and surrounding areas of Mobile and Baldwin Counties." The record evidence discloses that Mobile's proposed primary service contours encompass several towns including Prichard, population 41,578, Satsuma, population 2,035, Saraland, population 7,840, and Chickasaw, population 8,447, all in Mobile County; and Fairhope, population 5,720, in Baldwin County.[20] However, with the exception of the Prichard Chief of Police and a teacher in a school located just outside the City of Mobile, the record does not indicate whether the community leaders listed by Mobile are actually in a position to have knowledge of the problems of areas surrounding the City of Mobile, nor does the record indicate where these leaders reside. Further, the record evidence does not, in our view, support an inference that these leaders had "substantial contacts" outside the City of Mobile, as argued by Mobile. We believe that the Commission, in adopting the requirement that an applicant obtain a "broad overview of community problems" outside its principal city of license, envisioned something more than a few contacts with individuals who, by the nature of their various occupations, may possibly possess some knowledge or awareness of problems and needs in areas outside the proposed city of license. The *Primer* is explicit in its requirement that an applicant consult leaders outside the principal city of license who "can be expected" to have a broad overview of community problems. Mobile has failed to demonstrate that these interviewees possess a knowledge or awareness of problems in the numerous towns and municipalities surrounding Mobile, Alabama, and, consequently, its survey is defective in this area also. *Cf. Petersburg Television Corp.*, 19 FCC 451, 10 RR 567, reconsideration denied 10 RR 5846 (1954), affirmed *sub. nom. Southside Virginia Telecasting Corp.* v. *FCC*, 97 U.S. App. D.C. 130, 228 F.2d 644, 13 RR 2043 (1955), cert. denied 350 U.S. 1001 (1956).

11. *Correlation of Programming With Ascertained Problems.* Finally, the Review Board is of the opinion that Mobile failed to adequately correlate its proposed programming with its ascertained com-

[18] Q. & A. 7 of the *Primer* provides:
Question: Must the ascertainment of community problems for the other areas the applicant undertakes to serve be as extensive as for the city of license?
Answer: No. Normally, consultations with community leaders who can be expected to have a broad overview of community problems would be sufficient to ascertain community problems. [27 FCC 2d at 683, 21 RR 2d at 1543.]

[19] According to Mobile, it interviewed the following leaders with contacts outside the City of Mobile: Art Keeney, Mobile County School Board Public Relations Director; Howard Yeager, Mobile County Commissioner; Charles McDonald, member of the State Industrial Advisory Board; Gladys Cherniak, teacher in the Mobile County School System; Leonard Wyatt, member of the Board of Mobile County PTA; Arnold Delrow, Mobile County Tax Assessor; Ann Hambly, Executive Secretary of Mobile County Civil Defense; Earl Sweatt, Business Editor of the Mobile Press Register who reported on business activities in Mobile, Baldwin and Washington counties; Martin Johnson, director of the Social Security Office which serves Mobile, Baldwin and Washington counties; and Dan David, Prichard Chief of Police.

[20] Population figures are based on official United States Census Data for 1970.

munity problems as required by the *Primer* Q. & A. 29.[21] In its *Suburban* amendment of February 2, 1972, Mobile made no attempt at correlation whatsoever. Similarly, its hearing exhibits are devoid of the necessary correlation, despite the fact that this is an explicit requirement of the *Primer*. Instead, Mobile relies upon the oral testimony of Howard Smith, its Vice President; however, even his testimony, when viewed in its most favorable light, fails to provide a meaningful correlation between programming and community problems. Quite apart from the fact that this correlation step is a requirement of the *Primer* and properly should be set forth in the application or in an amendment thereto,[22] Smith's oral testimony is, in essence, nothing more than a statement that Mobile intends to treat all of its ascertained problems by means of its overall programming; such a method of correlation is expressly rejected by the *Primer* (see note 21, *supra*). For example, Mobile listed water and air pollution as a community problem and Smith testified:

> One of the other large areas of concern is air and water pollution. I do not see that we can cure all the world's ills or the pollution problems. But we do say that this is an area that does need to be reported properly to the public; because certain industries are very large does not mean to us that reportage of their dumping of raw chemicals of one type or another into the water supply should be suppressed.
>
> We think this should be reported and we think they should be held to the law, just like everybody else. In other words, we believe that our programming will meet—to the extent that it is possible—this problem.
>
> We will deal with this problem to the extent that any broadcast facility could deal with it. (Tr. 3163).

As the above example illustrates, Mobile's correlation is too vague and generalized to demonstrate that its proposed programming will adequately treat its ascertained community problems. While not all of Smith's testimony is as vague as that described above, the Board is unable, on the basis of the testimony, viewed even in its most favorable light, to conclude that the proposed programming will meet the needs it has ascertained. In sum, Mobile's failure to provide concrete information regarding the relationship between its proposed programming and ascertained community problems also warrants denial of its application. See *Harry D. Stephenson and Robert E. Stephenson*, 33 FCC 2d 749, 23 RR 2d 760 (1972). *Cf. Cosmos Broadcasting Corp.*, 31 FCC 2d 200, 22 RR 2d 723 (1971); *Middle Georgia Broadcasting Co.*, 30 FCC 2d 796, 22 RR 2d 524 (1971).

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[21] Q. & A. 29 of the *Primer* provides, in pertinent part, that: "The applicant should give the description, and anticipated time segment, duration and frequency of broadcast of the program or program series, and the community problem or problems which are to be treated by it. One appropriate way would be to list the broadcast matter and, after it, the particular problem or problems the broadcast matter is designed to meet. Statements such as "programs will be broadcast from time to time to meet community problems," or "news, talk and discussion programs will be used to meet community problems," are clearly insufficient. Applicants should note that they are expected to make a positive, diligent, and continuing effort to meet community problems. Therefore, they are expected to modify their broadcast matter if warranted in light of changed community problems." [27 FCC 2d at 686, 21 RR 2d at 1547, 1548.]

[22] For example, in reviewing application for renewal of licenses, one of the areas which the Commission scrutinizes is a licensee's promise versus performance regarding the actual broadcast of news, public affairs and other programming. If a licensee's programming proposals, especially his description of what programs are designed to meet what needs, are buried in oral testimony in a hearing record, the Commission is faced with an almost insurmountable task in determining whether the licensee treated all of its ascertained problems during the past license period. Thus, the proper method of correlation is, in our view, by means of the written *Suburban* statement accompanying the application, or in an amendment thereto.

12. As a final matter, the Board notes that both Azalea and Mobile were put on notice of the defects in their respective Suburban showings [23] and the fact that failure to ascertain the needs of their respective service areas would result in disqualification. In fact, this proceeding was remanded so that both applicants could bring their surveys into compliance with the Commission's *Suburban* requirements as unequivocally set forth in the *Primer*, *supra*. In our view, both Azalea and Mobile have failed to meet the minimal requirements of the *Primer*, and, thus, both applications must be denied. See *Voice of Dixie, Inc.*, *supra*. See also *Henry* v. *FCC*, *supra*.

13. Accordingly, IT IS ORDERED, That the motion to strike, filed April 29, 1974, by the Broadcast Bureau IS DENIED, and that the motion for acceptance of memorandum of law, filed April 8, 1974, by Mobile Broadcast Service, Inc. IS GRANTED and the attached memorandum of law IS ACCEPTED; and

14. IT IS FURTHER ORDERED, That the exceptions to the Initial Decision, FCC 69D–25, released April 22, 1969, ARE DISMISSED as moot; and

15. IT IS FURTHER ORDERED, That the applications of Azalea Corporation (File No. BP–17340) and Mobile Broadcast Service, Inc. (File No. BP–17478) for a new standard broadcast station in Mobile, Alabama, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION.
SYLVIA D. KESSLER, *Member, Review Board.*

APPENDIX

RULINGS ON EXCEPTIONS OF AZALEA CORPORATION TO THE SUPPLEMENTAL INITIAL DECISION

Exception No.	*Ruling*
1	Denied. The Presiding Judge did, in fact, conclude that Dr. England's death need not be reported. However, see paragraph 48 of the Supplemental Initial Decision and paragraph 6 of this Decision.
2	Denied. See paragraph 5 of this Decision. See also paragraphs 2 and 9 of the Commission's recent decision in *Voice of Dixie, Inc.*, 45 FCC 2d 1027, 1028, 1031, 29 RR 2d 1127, 1128, 1131 (1974).
3	Granted insofar as the record evidence indicates that Mobile purposefully refused to interview any Mobile city commissioners; *denied* in all other respects because it is Mobile's failure to interview any city commissioners which renders its survey defective. Mobile's intent, although relevant, is not determinative. See paragraph 8 of this Decision.

RULINGS OF EXCEPTIONS OF W.G.O.K., INC. TO THE SUPPLEMENTAL INITIAL DECISION

1	Granted with respect to the cities included within the Mobile Urbanized Area; *denied* with respect to the Mobile Primary Retail Area because it includes areas outside of Mobile's proposed primary service contours.

[23] *Cf.* note 17, *supra*.

Exception No.	*Ruling*
2, 16	Granted in substance, excluding Bay Minette because it is outside the proposed 2 mv/m contour. See paragraph 10 of this Decision.
3	Denied. The statistics concerning the Mobile Retail Trade Area are irrelevant to the *Suburban* issue because the counties included are outside of Mobile's proposed primary service contours. However, see paragraph 10 of this Decision.
4, 6	Denied. The record evidence supports the Judge's findings, which, in the Board's view, are material.
5, 12	Denied. The record evidence does not support these exceptions. However, see paragraph 10 of this Decision.
7	Denied. The Judge made findings on the results of Mobile's surveys in paragraph 30 of the Supplemental Initial Decision.
8, 9, 10, 11	Denied. The Judge's findings of fact regarding Mobile's correlation of problems and proposed programming are based on the record evidence; however, we disagree with the Judge's conclusions regarding the adequacy of Mobile's correlation because it is patently generalized and lacks the specificity called for by the *Primer*. See paragraph 11 of this Decision.
13	Denied. The Judge's findings accurately and adequately reflect the record.
14, 15	Denied. The record is unclear as to what areas Mobile proposes to serve. However, in its application, Mobile stated that it intends to serve "Mobile, Alabama, and surrounding areas of Mobile and Baldwin counties". The Board has taken official notice of this statement. See paragraph 10 of this Decision.
17	Granted in substance. See paragraph 10 of this Decision.
18	Granted in substance. See paragraph 11 of this Decision.
19, 20	Dismissed as moot. See footnote 3 to this Decision.
21	Granted to the extent that Mobile's application should be denied (see paragraphs 7–12 of this Decision); *dismissed* in all other respects insofar as WGOK's application has been dismissed.

RULINGS ON EXCEPTIONS OF THE BROADCAST BUREAU TO THE SUPPLEMENTAL INITIAL DECISION

1, 2, 3, 4, 5	Granted in substance. See paragraphs 8 and 9 of this Decision.
6	Denied. The record evidence indicates that Mobile interviewed numerous black leaders (see paragraph 26 of the Supplemental Initial Decision) and its failure to interview any NAACP chapter heads does not render its survey defective. See *Taft Broadcasting Co.*, 38 FCC 2d 770, 26 RR 2d 269 (1973). Compare paragraph 8 of this Decision.
7	Denied. The record evidence does not support the conclusion that "few" female leaders and "no" young leaders were interviewed. The record shows that Mobile contacted six female leaders and numerous other persons who were familiar with the problems of young people. In the Board's view, Mobile's contacts with these groups satisfy the requirements of the *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650, 668, 21 RR 2d 1507, 1526 (1971). See *Arco Broadcasting Corp.*, 39 FCC 2d 4, 25 RR 2d 840 (1972).
8	Granted. The Judge's "opinion" is not supported by the record evidence. See paragraphs 8 and 9 of this Decision.

Exception No.	*Ruling*
9	Granted to the extent that Mobile's failures to interview representatives of the manufacturing industry and Mobile city commissioners render its survey defective (see *Voice of Dixie, Inc.*, 45 FCC 2d 1027, 29 RR 2d 1127 (1974); see also paragraphs 8 and 9 of this Decision). *Denied* in all other respects for the reasons stated in our rulings on Bureau Exceptions 6 and 7.
10	Granted in substance. See paragraph 11 of this Decision.
11	Dismissed as moot. See our rulings on Exceptions 19 and 20 of W.G.O.K., Inc.
12	Granted for the reasons stated in this Decision.

FCC 69D-25

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
AZALEA CORP., MOBILE, ALA.	Docket No. 17555
	File No. BP-17340
WGOK, INC. (WGOK), MOBILE, ALA.	Docket No. 17556
	File No. BP-17398
PEOPLE'S PROGRESSIVE RADIO, INC., MOBILE, ALA.	Docket No. 17557
	File No. BP-17477
MOBILE BROADCAST SERVICE, INC., MOBILE, ALA.	Docket No. 17558
For Construction Permit	File No. BP-17478

APPEARANCES

Theodore Baron (Scharfeld, Bechhoefer, Baron, Finkelstein & Firestone) on behalf of Azalea Corporation; *Robert M. Booth, Jr.* and *Eugene T. Smith* on behalf of W.G.O.K., Inc.; *William J. Potts, Jr.* (Haley, Bader & Potts) on behalf of People's Progressive Radio, Inc.; *Rainer K. Kraus* (Koteen & Burt) on behalf of Mobile Broadcast Service, Inc.; and *Leo I. George* and *Charles W. Kelley* on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER CHESTER F. NAUMOWICZ, JR.

(Issued April 18, 1969; Released April 22, 1969)

PRELIMINARY STATEMENT

1. By orders of the Commission and the Review Board released July 13, and October 25, 1967, the above-captioned applications were set for hearing on the following issues:[1]

"1. To determine the areas and populations which would receive primary service from Azalea Corporation, People's Progressive Radio, Inc., and Mobile Broadcast Service, Inc. proposals, and the availability of other primary service to such areas and populations.

"2. To determine the areas and populations which may be expected to gain or lose service from the proposed operation of Station WGOK, Mobile, Alabama, and the availability of other primary service to such areas and populations.

"3. To determine, with respect to the Azalea Corporation application:

(a) Whether Harvey Mintz or James C. Jardine has sufficient net liquid assets to enable them to meet their commitments in the sum of $2,850 and $2,800, respectively.

[1] Certain of the issues have been renumbered and/or consolidated and reworded for the sake of brevity.

(b) Whether Charles Trainor has sufficient net liquid assets to enable him to meet his $14,700 commitment, and, if not, whether sufficient funds are available to him from the Merchants National Bank of Mobile to enable him to meet that commitment.

(c) Assuming that all of the funds, set forth in sub-issues 3–a through 3–b, *supra*, upon which the applicant relies will be available to it, how it will obtain sufficient additional funds to construct and operate the proposed station for one year.

(d) Whether, in the light of the evidence adduced pursuant to sub-issues 3–a through 3–c, *supra*, the applicant is financially qualified.

"4. To determine Azalea's and Mobile Broadcast Service, Inc.'s efforts to ascertain the programming needs and interests of the area to be served, and the manner in which each proposes to meet such needs and interests.

"5. To determine, with respect to the W.G.O.K., Inc. application:

(a) The expenses involved in the W.G.O.K., Inc. proposal.

(b) Whether W.G.O.K., Inc., possesses sufficient net liquid assets to enable it to meet those expenses.

(c) Whether Jules J. Paglin and/or Stanley W. Ray, Jr., has sufficient net liquid assets to enable each to meet his $50,000 loan commitment to the applicant.

(d) Whether, in the light of the evidence adduced with respect to sub-issues 5–a through 5–c, the applicant is financially qualified.

"6. To determine the facts and circumstances with respect to W.G.O.K., Inc.'s failure to disclose in its application herein the facts of the Decision and Order in *WGOK, Inc., et al*, reported at 152 NLRB 959 (1965); and to determine the effect of such facts and circumstances on W.G.O.K., Inc.'s requisite and comparative qualifications to receive a grant of its application.

"7. To determine with respect to the Mobile Broadcast Service, Inc. application:

(a) Whether the Mobile Broadcast Service, Inc., possesses sufficient net liquid assets to enable it to meet the expenses involved in its proposal.

(b) Whether E. Howard Smith possesses sufficient net liquid assets to enable him to meet his (1) $2,500 stock subscription, and (2) his $10,000 loan commitments.

(c) Whether Howard L. Smith, Robert A. Schorr, and Joseph R. Bancroft possess sufficient net liquid assets to enable each to meet his stock subscription in the respective amounts of $2,500, $8,500 and $8,500.

(c) The terms and conditions upon which a loan will be available to the applicant from the Commercial Guaranty of Mobile and whether such terms and conditions can be met by the applicant.

(e) Whether, in the light of the evidence adduced with respect to sub-issues 7–a through 7–d, the applicant is financially qualified.

"8. To determine with respect to the People's Progressive Radio, Inc. application:

(a) The terms upon which a loan will be available to the applicant from the First National Bank of Mobile.

(b) Whether John C. Smith possesses sufficient net liquid assets to enable him to meet his $4,700 subscription agreement.

(c) Whether, in the light of the evidence adduced with respect to the sub-issues, the applicant is financially qualified.

"9. To determine on a comparative basis the significant differences among the applicants with respect to the efforts made by each to ascertain the needs and interests of the community and area proposed to be served.

"10. To determine which of the proposals would best serve the public interest.

"11. To determine, in the light of the evidence adduced with respect to the foregoing issues, which of the applications should be granted."

2. In addition to the specifically designated issues, three Review Board opinions have expanded the evidentiary scope of this hearing:

(a) In an order released October 2, 1967, it was ruled:

(1) "... the Board deems it proper to enlarge on the inquiry contemplated by the designation order, and to provide that the determination should be whether there is a greater need for (a) the Negro-oriented formats proposed by WGOK and Azalea, (b) the news-oriented format proposed by Mobile Broadcasting, or (c) People's general market programming", and

(2) "... evidence concerning the duplicated programming [of Mobile Broadcast Service] is admissible under the standard comparative issue."

(b) In an order released December 12, 1967, the Board noted that the classification of People's programming as "general market" had been challenged, and authorized exploration, within the comparison contemplated by its order of October 2, 1967, of whether People's actually proposed a "general" or a "specialized" program format, and

(c) In an order released December 27, 1967, the Board authorized exploration of alleged "payola" at WGOK under the comparative issue.

3. The applicants published notice of the hearing and notified the Commission thereof pursuant to the governing statute and rules. Formal prehearing and hearing procedures were conducted at various times between July 25, 1967, and December 10, 1968, with the record being closed on the latter date.[2] All parties filed proposed findings of fact on March 17, 1969, and replies were filed by the applicants on April 14, 1969.

[2] All proceedings prior to October 21, 1968 were conducted before Examiner Elizabeth C. Smith. On that date the Chief Hearing Examiner released an order relieving Examiner Smith, and assigning the proceeding to Examiner Naumowicz.

104-041—74——2

FINDINGS OF FACT

Areas and Populations

4. W.G.O.K., Inc., the licensee of Class II Station WGOK, Mobile, Alabama, seeks to change its operation from 900 kc directionalized, to 960 kc, non-directional. Each of the other applicants seeks authorization for a new non-directional station at Mobile on 960 kc. Mobile, with a 1960 population of 202,000, has currently assigned to it 7 AM stations (including WGOK), 2 FM stations, and three television stations. There is also an AM station in Prichard, a community of 46,000 persons entirely surrounded by Mobile.

5. All of the proposed transmitter sites fall within a radius of 1.5 miles from a point midway between the People's and Mobile sites, the two which are furthest apart. The proposals would result in primary service as follows:

	Population	Area (square miles)
Azalea	320,971	1,575
WGOK	328,067	1,737
People's	321,059	1,612
Mobile	318,440	1,534

6. All of the proposals would provide primary service (2 mv/m) to the same urban areas with a total population of 272,997 persons. Between six and nine primary services are now available in the urban areas to be served. In the rural areas to be served between six and twelve primary services (0.5 mv/m) are now available. Five of the existing Mobile stations and the one in Prichard serve between 75 and 100% of the area which would be served by the proposed stations.

7. WGOK now serves 307,038 persons in 1,747 square miles within its 0.5 mv/m contour. Of these, 10,422 persons in rural areas totalling 378 square miles would lose service under the WGOK proposal. While parts of the loss area receive up to seven other services, 416 persons in 20.3 square miles receive only two other primary services, and 1,031 persons in 64.7 square miles receive only three other primary services.

8. The WGOK proposal would provide a new primary service to 31,451 persons in 368 square miles, including 17,667 residents of Mobile, and 932 persons in adjacent urban areas. From six to eight primary services are now available in the urban gain area, and from six to eleven such services are now available in the rural gain areas. The proposed service would result in a net service gain of 21,039 persons, and a net service loss of 10 square miles. In addition, the United States-Mexican Agreement on Radio Broadcasting in the Standard Broadcast Band limits WGOK in its sign-on times. The proposed frequency change would allow it to sign-on 15 minutes earlier in November, 45 minutes earlier in December and January, and 30 minutes earlier in February. The earlier sign-on would permit a total of 68 hours of additional broadcasting during the four-month period involved.

THE APPLICANTS AND THEIR FINANCIAL QUALIFICATIONS

Azalea Corporation

9. Azalea is an Alabama Corporation with the following principals:

Name	Office	Stock subscription (percent)
Charles E. Trainor	President and director	41.66
Robert W. Gilliard	Vice-president and director	8.33
Harvey H. Mintz	Secretary-treasurer and director	20.83
F. T. England		20.83
James C. Jardine		8.33

Azalea has no other broadcast interest.

10. Mr. Trainor would be employed as the full-time General Manager of the proposed station. He would have responsibility for day-to-day operations, subject to the policies established by the Board of Directors. From 1953 to 1955 he was Sales Promotion, Advertising and Merchandising Manager for an Atlanta radio and television operation. Between 1956 and 1960 he worked as office manager for national broadcasting representatives. Since 1960 he has been Manager of Radio Station WKRG in Mobile. He is a resident of Mobile county, some three miles outside the city limits, and he has been active in local civic and business activities. No other principal of Azalea would take a specified regular role in the station's management, although Dr. Gilliard, a practicing dentist, would be available for daily consultation on matters of programming and personnel.

11. Drs. Gilliard, Mintz and England, as well as Mr. Jardine are residents of Mobile, but none is possessed of broadcast experience.

12. Azalea will need $76,366 to put its station on the air and operate it for a period of one year. To meet these costs it has available an $80,000 line of credit from the Depost National Bank of Mobile and $14,189 credit from the Gates Radio Equipment Co.[3]

W.G.O.K., Inc.

13. W.G.O.K., Inc., is owned in equal shares by Jules J. Paglin (President, Treasurer and Director) and Stanley W. Ray, Jr., (Executive Vice President and Director). The record does not indicate whether the corporation has any other officers or directors. Paglin and Ray also share equal ownership in the licensees of Stations WBOK, New Orleans, Louisiana; WXOK, Baton Rouge, Louisiana; KYOK, Houston, Texas; and WLOK, Memphis, Tennessee.

14. Both Paglin and Ray are residents of New Orleans. Neither proposes to move to Mobile, and neither would be active in the day-to-day operation of the station. Their existing stations have been programmed primarily for the Negro population of the communities to which they are assigned, and the record does not indicate that the records of these stations have been "either unusually good or unusually poor" within the contemplation of the *Policy Statement on Compara-*

[3] Since Azalea can effectuate its proposal even without the capital contributions of its principals, the issues relating to their ability to meet their commitments are moot, and no findings relating thereto will be made.

tive Broadcast Hearings, 5 RR 2d 1901; see *Erway Television Corp.*, 9 RR 2d 1376. In 1967 the Commission concluded, FCC 67R–536, that employees of WGOK had solicited "payola", and that the internal controls at the station did not constitute "reasonable diligence" to prevent such attempts. However, the record does not indicate that the management of the station had knowledge of what was happening, and the offending employees were discharged when their activities were discovered.

15. The expense involved in the WGOK proposal is minimal. No changes in equipment are necessary other than changing the crystals in the transmitter frequency control unit and in the frequency monitor, and altering the antenna unit on the SW tower to match the tower to the transmission line for non-directional operation. It will also be necessary to remove the NE tower and to make antenna resistance measurements. In the opinion of WGOK's consulting engineer the expense is unlikely to exceed $1,000.

16. To meet this expense, the WGOK balance sheet as of December 31, 1967, showed cash in excess of $10,000 and accounts receivable in excess of $17,000, with current liabilities of less than $7,000.[4]

People's Progressive Radio, Inc.

17. People's is an Alabama corporation with the following principals:

Name	Office	Stock subscription (percent)
Bishop William T. Phillips	Chairman	19.8
Thomas O. Howell, Jr.	President and director	19.8
Bishop William M. Smith	Vice-president and director	19.8
Shafter W. Summers	Secretary and director	19.8
John L. Finley, Jr.	Treasurer and director	19.8
John C. Smith		1.0

People's has no other broadcast interests.

18. John C. Smith would be full-time General Manager of the proposed station. Smith entered broadcasting in 1952. He served in a sales capacity for Mobile stations between 1952 and 1959. In 1959 and 1961, respectively, he and a partner purchased Stations WKAB, Mobile, Alabama and WNVY, Pensacola, Florida. Smith's duties were principally directed to sales and administration, but he was also primarily responsible for programming and general operation. In 1965 the Pensacola station was sold, and Smith bought out his partner in the Mobile operation. Smith sold the Mobile station in 1966. Thereafter, he was employed as a salesman for another Mobile station. Mr. Smith has been a resident of Mobile since 1933, and has been active in local civic and social organizations.

19. Day-to-day program decisions and policies will be formulated by a Programming Committee composed of Bishops Phillips and Smith, each of whom would devote ten hours a week to such duty.

[4] Since the station's current assets are plainly more than sufficient to meet the expenses of its proposal, the issue relating to its principals' ability to meet their commitments is moot, and no findings relating thereto will be made.

Messrs. Summers, Finley and Howell would be members of a Community Affairs Committee which would establish and maintain contacts with community leaders and groups. Each gentleman proposes to devote ten hours a week to this task. All of these individuals are residents of Mobile, with the exception of Mr. Summers who lives in Prichard. All have been active in local religious, civic and business affairs, but none has any broadcast experience.

20. People's will require $90,744 to put its station on the air and operate it for one year. To meet these costs, it places reliance on a $100,000 loan from The First National Bank of Mobile.[5] The bank commitment, dated March 6, 1968 and valid for one year, conditioned the loan on the endorsements of the corporation's stockholders. It provided that interest only, at 6½%, would be paid for the first twelve months, and that the principal would then be repayable in 36 monthly installments. Each of the stockholders has agreed to supply the required endorsement.

21. On March 12, 1969, the bank extended its commitment to March 6, 1970.[6] The extension was conditioned on the submission by the endorsers of current financial information "in form acceptable to the bank", and changed the interest provisions to "in keeping with the prevailing rates at the time of the loan closing". It also provided that "the bank must satisfy itself that the financial status of the individuals has not deteriorated in the opinion of the bank". The record does not indicate that the endorsers have submitted current fiinancial information to the bank.

Mobile Broadcast Service, Inc.

22. The principals of Mobile are as follows:

Name	Office	Stock subscription (percent)
E. Howard Smith	President and director	34.7
Howard L. Smith	Vice-president and director	35.9
Joseph R. Bancroft	Director	11.8
Robert A. Schorr	Secretary and director	11.8
Julien E. Marx		5.8

23. E. Howard Smith and Howard L. Smith, father and son who together own 70.6% of Mobile, have been the owners of Station WLPR–FM, Mobile, Alabama since December of 1964. The evidence as to the record of the station does not indicate that it has been "unusually good or unusually poor" within the meaning of the Commission's *Policy Statement on Comparative Broadcast Hearings*, 5 RR 2d 1901. Mobile is not associated with any other instrument of mass communications.

24. Howard L. Smith would serve as Mobile's full-time General Manager. While a high school student he obtained a First Class Radio

[5] Since the proposed loan, if available, is adequate to meet People's needs, and since the other sources of capital are inadequate absent the loan, financial issues and evidence unrelated to the loan are moot, and no findings relating thereto will be made.

[6] The letter of extension was forwarded to the Commission on March 17, 1969 by counsel for People's with copies to counsel for all of the parties to this proceeding. No party has asked for an opportunity to examine or to rebut the letter.

Telephone License. He was active in the engineering of the University of Alabama's broadcast station while a student there, and during 1958–9 he worked part-time as an announcer-engineer at commercial Station WNPT. Later, while a graduate student and instructor, he served as faculty adviser to the University's radio station. He was employed at KFBC–TV, Cheyenne, Wyoming in 1955; WALA, Mobile, Alabama intermittently from 1957–60; WACT, Tuscaloosa, Alabama from 1962 to 1963; and WBCA, Bay Minette, Alabama, in 1963, although the record does not indicate in what capacity he served these stations. Later in 1963 he returned to Mobile to prosecute the application for what became WLPR–FM. Since 1964 he has served as that station's full-time General Manager. He has been active in local civic and cultural organizations.

25. E. Howard Smith would serve as Mobile's full-time Comptroller and Program Director. Between the time WLPR–FM was established in December of 1964, and June of 1967 when he moved to Georgia, he devoted an average of 20 hours a week to virtually all phases of the station's activities. Since moving to Georgia he has continued to devote time to the station by keeping its books and related work. Between 1951 and 1967 he was a resident of Mobile, and would return to that community in the event of a grant.

26. Joseph R. Bancroft, who holds a First Class Radio Telephone License, would be Mobile's full-time Technical Director. Between 1945 and 1968 he served as communications officer in the Mobile Police Department, and since 1967 he has taught courses in electronics at Southwest Technical Institute in Mobile.

27. Julien E. Marx proposes to devote ten hours a week to the production of a weekly program about the activities of Mobile's Junior Chamber of Commerce, and serving as a contact with local civic and service organizations. He has had no broadcast experience. Marx resides in Mobile, and has been active in local civic organizations.

28. Robert A. Schorr would devote ten hours a week to undetermined duties at the station. He is a resident of Mobile, but he has had no broadcast experience.

29. Mobile will require $102,900 to put its station on the air and operate it for a period of one year. To meet these costs it relies on an $80,000 loan from the American National Bank and Trust Company,[7] a $10,000 loan from E. Howard Smith, stock subscriptions of $23,000, net current assets of $3,305, and equipment on hand worth $5,500.

30. The American National Bank loan is subject to the conditions that: the stockholders must have contributed at least $20,000 equity capital; and that all of the stockholders, who must aggregate at least $60,000 in net worth exclusive of their equity in Mobile, must pledge their stock and personally endorse the note. Only the interest on the loan, at the rate of 6½% would be payable during the first year.

31. E. Howard Smith is committed to a stock subscription of $2,500, plus a $10,000 loan. As of July 31, 1967, he showed net liquid assets of $13,200. In addition, relative to the conditions of the bank loan, he showed other assets valued at $104,250.

[7] Substituted for the $70,000 Commercial Guaranty Bank of Mobile loan referenced in the order of designation.

32. Howard L. Smith has already paid his $2,500 stock subscription. Robert A. Schorr has net liquid assets in excess of $40,000 to meet his stocks subscription of $8,500. Joseph R. Bancroft would meet his $8,500 stock subscription through a loan from the First National Bank of Mobile. The bank has committed itself to the loan. Julien E. Marx' stock subscription of $1,000 was found to be satisfactory in the order of designation.

ASCERTAINMENT OF NEEDS

Azalea

33. By May of 1962 Mr. Trainor was of the opinion that Station WMOZ would be going off the air, and decided to seek a station to take over its facilities. Since WMOZ had been directed to that one-third of Mobile's population which is Negro, Trainor decided that any replacement should continue that orientation. He did not consider any other programming format, and his decision to aim for the Negro market was entirely his own unsupported by any special effort to determine community need.

34. Trainor's first step was to contact a Mobile attorney who put him in touch with Drs. Mintz and England and Mr. Jardine who subsequently became stockholders of Azalea. Programming contacts were made with Bishop William T. Phillips, Mobile City Commissioner Joseph Langen, State Senator John Tyson, Robert Lancaster of the Internal Revenue Service, Pat White, a prominent Episcopal layman, and Arthur G. Keeney, the news director of Station WKRG. Programming was also discussed with Dr. Robert Gilliard, a dentist and local President of the NAACP, who later became a stockholder of Azalea. The record does not permit a precise finding as to when these contacts took place, but they occurred at various times between 1964 and 1966. Although a firm decision had already been made to program for the Negro market, only two of the program contacts, Bishop Phillips and Dr. Gilliard were Negroes.

35. Although no other contacts with identified individuals were made, in 1964 Trainor hired a Negro student to make man-on-the-street contacts with Mobile Negroes using a form questionnaire. Seventeen such interviews were conducted. The persons interviewed cast their answers in the form of criticism of the WMOZ programming, and the thrust of their collective opinion was that they would prefer less talk and blues music, and more spiritual and classical music. Upon seeing the results of the survey, Trainor "got the feeling" that the interviewer was leading the people, and that the interviewees did not understand the questions.[8] Hence, he disregarded the survey, and made no attempt to confirm or refute its results.

36. After Dr. Gilliard joined Azalea his opinion was consulted in the formulation of programming. He discussed the matter informally with the Executive Committee of the local chapter of the NAACP, but the record does not indicate that he solicited or received suggestions from that or any other source. In any event no other programming contacts were made and there has been no departure from Trainor's original programming concept.

[8] Trainor was unable to believe that the people interviewed were actually interested in classical music as he understood that term.

37. The programming which Azalea proposes is indistinguishable from that presented by innumerable music-centered stations throughout the nation. It is considered by Azalea as Negro-oriented because the selection of music is what Trainor regards as appealing to Negroes, and because the non-musical portion will be presented by Negro personalities and concern Negro organizations or activities which involve large number of Negroes.[9]

WGOK

38. There has been no issue designated as to WGOK's basic qualifications relative to ascertainment of programming needs. However, in the order of October 25, 1967, which added the comparative ascertainment of needs issues, the Board noted that, although "as an existing station not proposing a substantial change in programming, WGOK was exempt from filing Section IV–A (programming) of its application . . . under the comparative issue being added herein, the composition of the area and population to be gained and the extent of the applicant's ascertainment efforts with respect thereto are legitimate bases for evidentiary inquiry". That is to say, it was incumbent on WGOK to show that there was a need for its specialized program format *in the gain areas* it would serve, and the efforts it made *in such areas* to ascertain the programming needs.

39. WGOK directs its present programming to the Negro citizens of Mobile. The record is barren of any evidence as to whether there is any need for such programming in the proposed gain areas or what, if any, efforts WGOK made to discover programming needs in the gain area.

40. Indeed, WGOK's only demonstrated community contacts for the specific purpose of discussing programming occurred on December 17, 1966 when Mr. Paglin "went to Mobile and with a tape recorder interviewed a number [nine] of the citizens in the city of Mobile and tried to get from them some opinion as to number one, what type of programming we were doing and how they felt about it, and number two, what they felt we should supplement our programming, how they felt we should supplement our programming, if at all". The record does not indicate that the persons interviewed were asked to express opinions concerning the gain area, as opposed to Mobile proper; that they had any particular knowledge relating to the gain area; or that they even knew the location of the gain areas.

41. WGOK also offered evidence as to studies it has made or commissioned relating to the "Negro market" as a merchandising concept. However, not only were those studies concerned with programming only to the extent it relates to merchandising, many of them were directed to "Negro markets" as a whole, not to Mobile in general or to the gain area in particular.

People's

42. As with WGOK, People's ascertainment activities are considered only in a comparative context. The principals of the applicant assigned to Mr. Howell primary responsibility for directing the

[9] For example, programs will deal with Negro history, citizenship, NAACP policy matters, and consumer or credit education.

community contacts. Howell personally spoke to seven community leaders for the specific purpose of generating programming suggestions. In addition, during the course of financial conversations with two local bankers, Howell also solicited their views on programming.

43. Mr. Summers also solicited programming comments from four prominent citizens. Bishop Smith consulted three ministerial groups and six individual ministers on the subject, as well as four persons not primarily identified with religious organizations. The record does not reveal what, if any, suggestions were received as a result of People's contracts.

44. People's does not propose a specialized programming format, but seeks a service more general in its appeal emphasizing interracial communication. It cannot be found that this conception grew out of its community contacts, or that the programming concept has led to the formulation of plans for any particular programs. While the principals of People's have met to discuss their community contacts, the record does not identify any fruits of such discussions.

Mobile Broadcast

45. Virtually all of Mobile's community contacts have stemmed from the Smiths' involvement with Station WLPR–FM. Both Howard L. and E. Howard Smith have had numerous informal discussions with local citizens relating to programming. Although no special interview format was followed, and no contemporary notes were made, a number of these individuals were identified together with their general views on the subject.

46. In the fall of 1966 some 25 community leaders and representative citizens were formally interviewed by Howard L. Smith.[10] The persons interviewed, who spoke as individuals rather than representatives of organizations, were asked to think of themselves as "Program Director of the Day", and were questioned as to their programming interests and concepts. The interviews, which were to be broadcast over WLPR–FM, were tape-recorded.

47. On the basis of these informal conversations, formal interviews, and the Smiths' personal familiarity with programming in the area, it was decided that the community had need for a station concentrating on news presentation. This will be Mobile's area of emphasis, although it will not be a "news only" station.

NLRB Issue

48. Section II, Paragraph 10g of FCC Form 301 inquires: "Are there outstanding any unsatisfied judgments or decrees against applicant or any party to the application?" WGOK's instant Form 301 does not contain a Section II, but, with respect to Section II, refers to WGOK's 1963 renewal application. Nowhere in that renewal application was there any suggestion that any judgment or decree might be outstanding.

49. In June, 1964 an NLRB Examiner found that WGOK, Inc. had violated portions of the National Labor Relations Act, and en-

[10] These persons included three ministers, three educators, an attorney, officers of eight civic or professional organizations, a physician, six business executives, an engineer, a director of a national organization and a local school administrator.

tered an appropriate order to remedy the situation. In May, 1965, the NLRB affirmed its Examiner's action, and in October, 1967, the United States Court of Appeals, Fifth Circuit, affirmed in part and reversed in part. Thus, when WGOK's application to modify facilities was filed in August, 1966, the orders of the NLRB Examiner and the NLRB itself were both outstanding.

50. Stanley W. Ray, a principal of WGOK who is also a member of the bar, considered whether the application form required him to report the NLRB matter, and concluded that it was not necessary. His conclusion was based on the assumption that question 10g referred back to the earlier portions of question 10, and was concerned only with those judgments or decrees to which such earlier portions of question 10 pertained.[11] At the time he made his decision he was unaware of the existence of the Commission's *Report on Uniform Policy as to Violations by Applicants of Laws of the United States*, 1 RR (Part 3) 91:495, and understood question 10g to apply only to the judgments or decrees of a court. He did not seek the opinion of anyone else as to whether the NLRB matter need be reported.

CONCLUSIONS

Financial Issues

51. Azalea Corporation will need $76,366 to put its station on the air and operate it for one year. It has available a bank loan of $80,000. The applicant is financially qualified.

52. WGOK, Inc. will need approximately $1,000 to effectuate its proposed modification of facilities. Its cash alone exceeds current liabilities by more than $3,000. The applicant is financially qualified.

53. Mobile Broadcast Service, Inc. will require $102,900 to put its station on the air and operate for one year. It would meet these expenses through equipment on hand worth $5,500, net current assets of $3,305, stock subscriptions of $23,000, a loan from E. Howard Smith of $10,000, and a bank loan of $80,000. All of these proposed

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[11] Question 10, Part II, Form 301 reads as follows:

"10(a) Has applicant or any party to this application had a station license revoked by order or decree of any Federal court?

(b) Has the applicant or any party to this application been found guilty by a Federal court of the violation of the laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade?

(c) Has the applicant or any party to this application been finally adjudged guilty by a Federal court of unlawfully monopolizing or attempting unlawfully to monopolize radio communications, directly or indirectly, through the control of the manufacture or sale of radio apparatus, through exclusive traffic arrangements, or by any other means, or to have been using unfair methods of competition?

(d) Has the applicant or any party to this application been found guilty by any court of (1) any felony, (2) any crime, not a felony, involving moral turpitude, (3) the violation of any State, territorial or local law relating to unlawful lotteries, restraints and monopolies and combinations, contracts or agreements in restraint of trade, or (4) using unfair methods of competition?

(e) Is there now pending in any court or administrative body against the applicant or any party to this application any action involving any of the matters referred to in paragraphs 10a, b, c, and d above?

(f) Have voluntary proceedings in bankruptcy been instituted by, or have involuntary proceedings in bankruptcy ever been brought against applicant or any party to this application?

(g) Are there outstanding any unsatisfied judgments or decrees against applicant or any party to this application?

(h) If the answer to any of the foregoing parts of this paragraph is 'Yes', submit as Exhibit No. — a full disclosure concerning the persons and matters involved, identifying the court and the proceeding (by dates and file numbers), stating the facts upon which the proceeding was based or the nature of the offense committed, and the disposition of the matter."

assets, totalling $121,805, have been shown to be available. The applicant is financially qualified.

54. People's Progressive Radio, Inc. will require $90,744 to put its station on the air and operate it for a period of one year. It has available a bank loan of $100,000. While the bank has conditioned its commitment on its satisfaction with the financial condition at the time the loan is taken down of the principals of People's who would endorse the note, such reservation seems to be no more than an explicit statement of a reservation which is implicit in virtually all loan commitments of the type here involved. People's has demonstrated a reasonable likelihood that the bank loan will be available, and it is concluded that the applicant is financially qualified.

"Suburban" Issue—Azalea and Mobile

55. Azalea's efforts to ascertain programming needs have been inadequate in two particulars. Either would be fatal.

56. First, Azalea determined that its programming would be oriented toward the Negro population of Mobile, yet this decision was made without *any* consultation with the community. Mr. Trainor was aware that approximately one-third of Mobile's population is Negro, and that WMOZ, which previously held the facility at issue here, aimed its programs toward that segment of the market. On this basis alone he determined that his proposed station would be directed to the same portion of the population. He did not solicit or consult the opinion of any person or group in reaching this decision. Thus, although it well may be that what Mobile needs is precisely what Azalea proposes, neither Mobile's principals nor the Commission have the benefit of community opinion on the point.

57. Secondly, assuming *arguendo* that what Mobile needs is another station directed primarily to the needs and tastes of its Negro citizens, Azalea's efforts to identify such needs and tastes were wholly inadequate. Programming contacts outside of the principals of the applicant itself, were limited to talks with six individuals, only one of whom was a member of the ethnic group to which the programming is to be directed. Even when such an effort is supplemented, as here, by the opinion of a principal of the applicant who is an important officer of a prominent organization bespeaking the minority involved, the total community consultation constitutes far less than the representative cross-section contemplated by the Commission, *Andy Valley B/Casting System, Inc.*, 12 RR 2d 691. Indeed, the *pro forma* nature of Azalea's ascertainment activities is highlighted by its treatment of the man-on-the-street survey it undertook. When it discovered that the initial results of that survey failed to confirm Trainor's preconceptions, Azalea assumed that its pollster must be at fault and discarded his work product. Although the record does not permit any conclusion as to the probable reliability of the disregarded survey, it is possible to conclude that Azalea's conduct with respect thereto was wholly contrary to the spirit of the Commission's directives relating to community consultation. If an applicant's citizen interviews suggest that its programming proposals are inappropriate, contrary to what it had hoped to establish, the proper course is not merely to assume that the survey is wrong. At this point, the applicant

must give consideration to redesigning either its survey or its programming. Azalea, having done neither, is in a position even weaker than if it had done nothing at all to ascertain community opinion. It is not concluded that Azalea has taken reasonable action to determine either that Mobile needs another station programmed for its Negro minority, or, if it does, that Azalea's proposal will satisfy that need.

58. Mobile Broadcasting's ascertainment efforts have been an incidental product of the Smiths' operation of WLPR–FM. This, of course, need not be regarded as a defect if the substance of the Commission's objective has been satisfied. The matter to be decided is whether Mobile's efforts were adequate to meet those objectives.

59. It is concluded that Mobile's efforts were adequate, although only marginally. No credit flows from the informal discussions. While such activities are commendable, and perhaps essential if the Commission's policy is to be effectuated, they are entitled to no evidentiary weight where, as here, the applicant made no notes and retains nothing more than an overall impression from his contacts.

60. Of greater consequence were the 25 "Program Director of the Day" interviews. The persons selected represent a reasonably broad cross-section of persons prominent in community affairs [12] for the purpose of permitting the applicant to "become informed of the real needs and interests of the area to be served", *Sioux Empire Broadcasting Co.*, FCC 69–218, released March 18, 1969. While it would have preferable had the individuals involved undertaken to speak as group representatives rather than individuals, the record does not suggest that their views might have been different. It also would have been preferable had the people spoken of programming in the context of a proposed AM station rather than an existing FM station, but the record does not suggest that programming needs differ in Mobile according to the kind of facility satisfying them. Nevertheless, despite these deficiencies, it can be concluded that at the time Mobile Broadcasting composed its programming proposals it had the benefit of the views of a rough cross-section of the community it proposes to serve.

NLRB Issue (WGOK)

61. WGOK's explanation for its failure to report the NLRB matter to the Commission is that its principal, Stanley W. Ray, who is a member of the bar, formed the legal opinion that the matter need not be reported. He based that conclusion solely on the language of Form 301 itself, and was unaware of the Commission's *Report as to Violations of Laws* at the time he made his decision. There is no evidence to contradict this version of events nor is there any reason to doubt it. Ray's explanation of his interpretation of the pertinent question on the Form 301 is not only plausible but reasonable.

62. First, it should be noted that, at the time Ray interpreted question 10g there was no *specific* Commission directive or decision assert-

[12] It may be suspected that one professionally qualified as an authority on sampling techniques might fault the composition of the sample. However, no such professional opinion appears on the record, and the Commission has not yet ruled either that professional surveys are necessary to satisfy the "Suburban" issue, or that its hearing officers possess the requisite qualifications to pass on the point absent the record evidence of properly qualified witnesses.

ing that the question required information as to non-judicial action. The form requires applicants to furnish specifics as to "judgments" and "decrees", and an attorney might well have regarded those words as describing certain purely judicial acts. Indeed, although there is a paucity of precedent on the subject, the recognized authorities on the meaning of words used in law, and the cases on which they rely, indicate that the decisions of administrative bodies are not "decrees", *Black's Law Dictionary*, Fourth Edition, 1961; *Bouvier's Law Dictionary*, Baldwin's Century Edition, 1948.

63. Moreover, consideration of the specific language of the question itself might lend to misunderstanding as to the precise scope of the Commission's interest. Questions 10a, b, c, d, and f pertain exclusively to judicial acts, and question 10e is concerned only with very specific administrative action not pertinent to the outstanding NLRB decree. The only portion of question 10 which permits more than a simple "yes" or "no" answer is 10h which purports to apply to "any of the foregoing parts" of the question, but which itself specifies identification only of the "court" involved. It would not be unnatural for counsel to assume that the Commission is interested only in what it says it is interested in.

64. It should also be noted that even the *Report on Uniform Policy as to Violations by Applicants of Laws of the United States*, *supra*, does not unequivocably clarify the matter. While that *Report* suggests a very broad area of permissible interest by the Commission, it does not specify the various types of adjudication which the Commission will consider. Hence, Ray might well have failed to comprehend that by the release of the *Report* the Commission intended to broaden the apparent scope of Question 10g of FCC Form 301, *Azalea Corporation*, 10 FCC 2d 364. It is concluded, that WGOK's failure to report the NLRB order was the product of a reasonable misunderstanding, and does not reflect adversely on the applicant's qualifications for a license.[13]

COMPARATIVE ISSUES

Coverage

65. As between the three applicants[14] for new stations, there is no decisionally significant difference in coverage. Each would serve roughly 320,000 persons in approximately the same geographical areas, and all of the persons to be served already receive a multiplicity of signals.

66. While WGOK would serve some 7–10,000 more persons than its competitors, the difference is not of sufficient magnitude to affect the decision since the percentage of population is very small, and the persons involved are not faced with a shortage of service. Nevertheless, there are decisionally material engineering differences between WGOK and its competitors. The WGOK proposal would result in a net gain

[13] Had Ray reached his decision at a time subsequent to the publication of Commission precedent on the necessity to report administrative actions, a different conclusion might be warranted, *Kittyhawk Broadcasting Corporation*, FCC 69D–3.

[14] Although the Examiner has concluded that Azalea is to be denied for failure to meet the "Suburban" issue, these conclusions will accord Azalea comparative evaluation.

of only 21,000 persons, less than 10% of the population which would be brought a new service by its competitors. While the fact that all of the populations involved already are abundantly serviced reduces the significance of this consideration, the disparity is still great and of decisional significance. Moreover, of the 10,000 persons who would lose existing WGOK service, some 1,500 receive only two or three other services. To these people the loss of a service will be more noticeable, and the matter must be weighed against WGOK.

67. On the other hand, of the 31,000 persons who would receive a primary service from WGOK for the first time, 17,000 live in Mobile, and such an improvement in efficiency with respect to the community of assignment is a desirable attainment. Moreover, during the winter months the station could serve its listeners a few minutes longer each day. While these favorable aspects of the proposal further reduce the significance of the distinction in populations to be brought a new service, they do not compensate for the very great disparity which has been proven. It is concluded that the WGOK proposal is significantly less meritorious than those of its competitors with respect to the areas and populations to be served.

Ascertainment of Need

68. As has been noted, Azalea's ascertainment activities were woefully weak. WGOK's showing is no stronger. The applicant made no community contacts in the gain area it proposes to serve. It relies on its general knowledge of "Negro markets" in general and of the "Negro market" in Mobile in particular. It has not even attempted to show that within the gain area, as contrasted to Mobile as a whole, there is any need whatsoever for its proposed programming. Its only programming survey involved contact with but nine individuals, and they are not shown to have been related in any way to the gain area. Had a "Suburban" issue been directed against WGOK, it seems unlikely that it would have been resolved in the applicant's favor.

69. People's and Mobile Broadcast fare but little better. As heretofore noted, Mobile Broadcast limited its contacts to interviews incident to the operation of its FM station. It did not make a special effort to consult the community relative to its AM plans. While it may, fortuitously, have conducted sufficient programming interviews to escape disqualification under the "Suburban" issue, its performance is not such as to warrant any sort of a comparative preference.

70. People's showing is not really any stronger. A very few contacts were made with community leaders for the purpose of discussing programming, but it does not appear that they were sufficient to identify any specific need. In any event, they have not been reflected in the applicant's program plans, which remain no more than a generalized concept.

71. Thus, it is concluded that none of the four applicants has shown substantial and productive "consultations with community leaders to become informed of the real needs and interests of the area to be served", *Sioux Empire, supra.* At best, they have demonstrated half-hearted *pro forma* compliance with the Commission's requirement. While there are differences between them, their performances range from non-existent to barely adequate. Under such circumstances, the

awarding of a preference would be a mockery, for it would imply that the efforts of the preferred party tended to further the Commission's objective of routing programming in the population of the community to be served. Since no such inference is warranted, no preference will be awarded.

72. The Board's order of October 2, 1967, provided for determination of which program orientation would serve the greater need. It has been concluded that none of the applicants has made any sort of a meaningful survey to determine community need, and from this flows the further conclusion that the record furnishes no basis for concluding which proposal might best serve the greater need. Absent a preliminary demonstration of what community needs are, there is no basis for deciding which is the most deserving of service. Hence, there have been no findings made as to the applicants' programming proposals, and no conclusions as to which programming concept should be preferred. Given the applicants' inadequate ascertainment efforts, such conclusions could rest only on conjecture.

Other Comparative Factors

73. Azalea and People's have no other broadcast interests. The owners of WGOK also own standard broadcast stations in four other southern cities, while the individuals controlling Mobile Broadcast already own an FM station in Mobile. It is apparent that on this vital factor Azalea and People's are to be preferred.

74. However, the preference cannot be described as unsurmountable. WGOK is an existing station, and a grant to it would merely preserve the *status quo* on diversification except with respect to the relatively small number of persons who would be receiving its service for the first time. Although Mobile Broadcast's ownership of a station in the very community applied for is undesirable, the fact that its FM station is but one of twelve broadcast services operating in the community reduces the significance of the matter. It is concluded that the proposals of Azalea and People's, which would further diversify station ownership in Mobile by bringing a new service, are entitled to a slight preference over WGOK which would merely preserve the existing pattern of ownership. WGOK, on the other hand, is entitled to a very slight preference over Mobile Broadcast which would tend to concentrate station ownership by putting the new AM station in the hands of the owners of an existing FM station.

75. The only applicant not proposing some integration of ownership and management is WGOK. Mr. Trainor, the owner of 41.66% of Azalea's stock would function as the full-time General Manager of that applicant's station. The owners of 82.4% of Mobile Broadcast's stock would be full-time employees of the station. Howard L. Smith would be the General Manager, E. Howard Smith would be Comptroller and Program Director, and Joseph R. Bancroft would be technical director. Both of Mobile Broadcast's other stockholders propose to devote ten hours a week to the station, but their roles are not sufficiently well defined to attain significance on the integration factor. A stockholder of People's, John C. Smith, would be the full-time General Manager of the applicant's proposed station. However, Mr. Smith holds only 1% of People's stock.

76. WGOK will be the least preferred. However, People's showing is only slightly better. Mr. Smith is a broadcaster of experience, and he has a satisfactory local background. However, his 1% stock ownership is not sufficient to qualify him as a "principal owner", and People's showing on integration is very weak, *Windber Community B/Casting System*, 25 RR 143.

77. Both Azalea and Mobile Broadcast make strong showings on integration. Azalea's principal administrative officer owns nearly half of that applicant's stock. He is an experienced broadcaster with a strong local background. However, Mobile Broadcast's showing is even better. Its principal administrative officer owns over one-third of its stock, and its program director owns another one-third. Still another 11.8% is held by a man who would be present full-time as technical director. Here also there is substantial broadcast experience and local identification.

78. It is concluded that Mobile Broadcast is entitled to a slight integration preference over Azalea, and the latter is entitled to a substantial preference over both of the other applicants.

79. None of the applicants has been shown to be markedly superior or inferior to its competitors on any other factor.

80. In sum, WGOK has been found equally inferior to the other three applicants on the areas and populations comparison. Azalea and People's are slightly superior to WGOK on the factor of diversification, where WGOK, in turn enjoys a slight preference over Mobile Broadcast. On the factor of integration, Mobile Broadcast merits a moderate preference over Azalea, and both are superior to the other two applicants. No other decimal preferences have been made.

81. Proceeding by a process of elimination, WGOK is in the least enviable position of the four. It ranks last on engineering and integration, and no better than third on diversification.

82. Each of the other three applicants enjoys certain advantages. On diversification Azalea and People's share an equal advantage over Mobile Broadcast. On integration Mobile Broadcast is moderately superior to Azalea, and both have a distinct preference over People's. No other distinctions are of decisional significance.

83. Ordinarily, Azalea would be preferred. A grant to it would be wholly in accord with the Commission's diversification policy, and its integration showing has been genuinely strong. A grant to either of its competitors would disserve one objective or the other.

84. Nevertheless, a grant to Azalea is not possible in view of the earlier conclusions. It has been found to have failed in its obligation to consult meaningfully with the community in order to ascertain the needs of those it would serve. In reaching this conclusion, the Examiner is not unaware that he has declined to find Azalea *comparatively* inferior to its competitors on the factor of community contacts. This, however, is not because there were no distinctions between the applicants, but because the showing of even the strongest of them was inadequate to support an affirmative preference. Mobile Broadcasting met its "Suburban" issue only by the fortuitous coincidence that the exigencies of one of its FM programs required enough community contact on the subject of programming to constitute a marginally adequate showing. People's activities have not permitted it to advance

beyond a vague concept as to its programming, and it has not yet made firm decisions as to its actual programs. Nevertheless, the Examiner cannot reach conclusions beyond the scope of the issues, and his comparative choice must be limited to those applicants who have not run afoul of a disqualifying issue, even when such successful navigation is attributable to the fact that not all of the applicants were required to face the same consequences if their evidence as to community contacts was weak.

85. As between Mobile Broadcast and People's, the former will be preferred. Although a preference on diversification is often controlling, in this case the factor is of diminished significance. Mobile Broadcast is the owner of a single FM station, and that is but one of many facilities serving Mobile. A grant to it would not, as a practical matter, materially reduce the number of voices to be heard in Mobile, nor would it tend to lend prominence to a single broadcaster. The integration preference, on the other hand, is clear and substantial. The controlling owners of Mobile Broadcast would participate in their operation all day every day. There is substantial likelihood that the station would be responsive to what its managers perceive to be the interests of the community. People's integration, however, is no more than a token. A 1% stockholder is not likely to be dominant in the counsels of the corporation, and the benefits of integration are unlikely to be realized. Under these circumstances, the strong integration preference outweighs the slightly superior showing on diversification.

Accordingly, IT IS ORDERED, That, unless an appeal is taken to the Commission by a party or the Commission reviews the Initial Decision on its own motion pursuant to Rule 1.276, that application of Mobile Broadcast Service, Inc., IS GRANTED; and the applications of Azalea Corporation, W.G.O.K., Inc., and People's Progressive Radio, Inc., ARE DENIED; and

IT IS FURTHER ORDERED, That the above grant is subject to the conditions recited in the order of designation released herein on July 13, 1967.

FEDERAL COMMUNICATIONS COMMISSION,
CHESTER F. NAUMOWICZ, JR., *Hearing Examiner.*

47 F.C.C. 2d

FCC 74-553

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
AMENDMENT OF PART 76, SUBPART B, AND PART 78, SUBPART B, OF THE COMMISSION'S RULES AND REGULATIONS CONCERNING PROCEDURES IN THE CABLE TELEVISION SERVICE AND CABLE TELEVISION RELAY SERVICE

ORDER

(Adopted May 29, 1974; Released June 3, 1974)

BY THE COMMISSION:

1. It has come to our attention that some applicants, petitioners or other parties to Cable Television proceedings pending before the Commission have failed to keep the Commission informed on substantial and significant changes in matters relating to their pleadings. All parties need to be aware of their continuing obligation to update their pleadings. Such information as changes or transfers of ownership, later revisions of signal carriage proposals, or re-negotiations or alterations of franchise terms are vital to comprehensive review of the facts and pleadings upon which the Commission must rely in deciding how to rule on a matter.

2. We conclude that certain editorial additions to the Rules are necessary to emphasize the obligations of parties to proceedings before us. We are adding a note to §§ 76.7 and 76.13 of the Cable Television Rules, and to § 78.15 of the Cable Television Relay Rules, which draws attention to § 1.65 "Substantial and significant changes in information furnished by applicants to the Commission". As required by § 1.65, we expect petitioners, applicants, those who comment and those who object to take the initiative in keeping their filings current, accurate and complete. Should there be any procedural conflict between the specific provisions of §§ 76.7, 76.13, 78.15 and 1.65, it should be resolved in favor of the specific provisions.

3. Since the additions we make are interpretive or relate to Commission procedures, the prior notice provisions, and effective date provisions of Section 4 of the Administrative Procedure Act, 5 U.S.C. § 553, do not apply. Authority for these changes adopted herein is contained in Sections 2, 3, and 4 (i) and (j) of the Communications Act of 1934, as amended.

4. Accordingly, IT IS ORDERED, That effective July 12, 1974, Part 76 and Part 78 of the Commission's Rules are AMENDED as set forth in the attached Appendix.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

Parts 76 and 78 of Chapter I of Title 47 of the Code of Federal Regulations are amended as follows:

1. In § 76.7, immediately after paragraph (i)(3), a note is added to read as follows:

§ 76.7 Special Relief

* * * * * * *

NOTE: Each party filing a petition, comments, opposition or other pleading pursuant to § 76.7 is responsible for the continuing accuracy and completeness of all information in such document. The provisions of § 1.65 are wholly applicable to pleadings involving § 76.7, except that where specific provisions of the latter conflict with the former, the specific provisions of § 76.7 are controlling, e.g., where requirements for service on specified parties of certain information may vary.

2. In § 76.13, the note at the end of the section is designated as Note 1 and a new Note 2 is added to read as follows:

§ 76.13 Filing of applications

* * * * * * *

NOTE 2: Each applicant filing pursuant to § 76.13 is responsible for the continuing accuray and completeness of all information in such applications. The provisions of § 1.65 are wholly applicable to applications under § 76.13, as well as to amendments filed pursuant to § 76.18, and objections filed pursuant to § 76.27, except that where the specific provisions of §§ 76.13, 76.18 or 76.27 conflict with the provisions of § 1.65, the specific provisions are controlling, e.g., where requirements for service on specified parties of certain information may vary.

3. In § 78.15, the note at the end of the section is designated as Note 1 and a new Note 2 is added to read as follows:

§ 78.15 Contents of applications

* * * * * * *

NOTE 2: Each applicant filing pursuant to § 78.15 is responsible for the continuing accuracy and completeness of all information in such applications. The provisions of § 1.65 are wholly applicable to applications pursuant to § 78.15, as well as to amendments filed pursuant to § 78.17, and objections filed pursuant to § 78.22, except that where the specific provisions of §§ 78.15, 78.17, or 78.22 conflict with the provisions of § 1.65, the specific provisions are controlling, e.g., where requirements for service on specified parties of certain information may vary.

FCC 74-568

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of CENTAUR BROADCASTING, INC. Application for Additional Time to Construct Radio Station KMAP (FM), Albuquerque, N. Mex.	File No. BMPH-13601
In Re Application of CENTAUR BROADCASTING, INC. (ASSIGNOR) AND SUN COUNTRY RADIO, INC. (ASSIGNEE) For Commission Consent To Assignment of the Construction Permit for Station KMAP (FM), Albuquerque, N. Mex.	File No. BAPH-525

MEMORANDUM OPINION AND ORDER

(Adopted May 30, 1974; Released June 5, 1974)

BY THE COMMISSION: COMMISSIONER QUELLO NOT PARTICIPATING.

1. We have before us for consideration: (1) the above-captioned applications for additional time to construct Station KMAP(FM) and for assignment of the KMAP(FM) construction permit from Centaur Broadcasting, Inc. to Sun Country Radio, Inc., (2) a Petition to Deny both applications, filed by Hubbard Broadcasting, Inc., licensee of Stations KOB-AM-FM-TV, Albuquerque, New Mexico, and (3) pleadings in opposition and reply thereto. In view of our discussion below, we will consider the petition on its merits without regard to procedural or party-in-interest questions. See *R. Edward Ceries*, 29 FCC 2d 78, 21 RR 2d 975 (1971).

BACKGROUND

2. A brief statement of background will be helpful in understanding the matters discussed below. Assignor's principals are S. Gerald Mollner and Richard Friedman. They acquired the KMAP(FM) construction permit by grant of May 4, 1971 (BAPH-489). Previously Mollner and Friedman were principals in the licensees of KRCH (FM), St. Louis (now KSLQ(FM); from 1967 until they sold it in 1972) and KFMX(FM), San Diego (now KYXY(FM); from 1964 to 1969). The application by which assignor acquired the KMAP (FM) construction permit (BAPH-489) in 1971 was subject to a petition to deny filed by the petitioner herein, Hubbard Broadcasting, Inc. At that time, Mollner and Friedman were the licensees of Station KRCH(FM), St. Louis. In 1969, the Commission allowed the sale of the licensee of KFMX(FM). In that application, as reasons for requesting the assignment, the principals stated that Mollner was

needed, full-time, in St. Louis to assist Friedman in solving the many problems of KRCH(FM). Hubbard questioned how Mollner and Friedman could acquire KMAP(FM) with no showing as to the condition of KRCH(FM). In an affidavit dated October 6, 1970, Mollner responded that in the thirteen months that he and Friedman had been working together, KRCH(FM) had been turned into a profitable operation and the other problems were substantially resolved. On November 26, 1971, Mollner and Friedman filed an application to assign the KRCH(FM) license, stating that they were unable to devote the necessary time to the station because of the unexpected rapid growth of certain broadcast associated ventures and other business interests throughout the country. The KRCH(FM) assignment was granted July 19, 1972.

3. In the subject KMAP(FM) assignment application, assignor states that it is requesting this assignment "To devote time required for the development of non-broadcast interests of principals." In the subject application for extension of time to construct, Centaur states:

> Applicant's principals, Messrs. Mollner and Friedman, decided to assign the license of KRCH in order that they might devote substantially full time to the Dial-a-Weather business [company provides telephone users with weather forecasts]. An application to assign the KRCH license was filed with the Commission on November 26, 1971 (BALH–1608). *Thereafter, applicant's principals had hoped to be able to activate the Albuquerque station utilizing proceeds from the KRCH sale.* [Emphasis added] Regrettably, the processing of the KRCH assignment application was inordinately delayed and, consequently, closing of the KRCH transaction did not occur until late August 1972. Moreover, while the application was pending, applicant's principals expended substantial sums to keep the station on the air pending approval of the assignment.

QUESTIONS OF CENTAUR'S CHARACTER QUALIFICATIONS

4. Petitioner raises two basic questions concerning the assignor's representations. Hubbard states that "(a)t no time did Centaur, in his applications for additional time in which to construct, notify the Commission of a change in its plans for financing the construction and operation of KMAP." That is, in its application for additional time in which to construct KMAP(FM), Centaur stated it hoped to utilize the proceeds from the KRCH(FM) sale to activate the pending Albuquerque station. Whereas, in its original application Mollner and Friedman proposed to personally finance Centaur.

5. Hubbard's second question concerning the assignor is "why were substantial funds needed to fund an operation (KRCH(FM)) which was represented to the Commission to have increasing revenues and a positive net cash flow?" As noted above, in October 1970, Mollner stated that the financial problems were substantially resolved and in a January 1972, amendment to the KRCH(FM) assignment application, Centaur stated "KRCH is operating with a positive net cash flow and therefore substantial operating deficits are not contemplated for the future."

6. Hubbard concludes that the conflict in the representations made by Centaur and its failure to notify the Commission of changes in its financial qualifications require an evidentiary hearing.

7. In response to Hubbard's charge that it failed to notify the Commission of a change in its plans for financing the construction and

operation of Station KMAP(FM), Centaur denies that it changed its original financial proposal. In response to petitioner's second question concerning the reason for the necessity of funds for KRCH(FM), Centaur responds that substantial sums were eventually required because of the length of time the assignment application was pending before the Commission. This application was filed on November 26, 1971 and granted on July 19, 1972.

8. Assignor explains that in calendar 1971, KRCH had a positive cash flow (excluding depreciation, amortization and payments to principals) of approximately $8,000. This compares to a negative cash flow of approximately $10,000 for calendar 1970. On November 1971, an application for permission to assign KRCH(FM) to Bartell Broadcasting of Missouri, Inc., was filed. Bartell proposed to change the program format from "good music" to "contemporary music." When word of the sale and impending change in format became known, "KRCH's competitors seized upon these circumstances to lure away its advertisers. Thus, when approval of the assignment was delayed, Mollner and Friedman were forced to advance substantial sums to KRCH in order to keep that station on the air. . . . During this period, Mollner and Friedman advanced in excess of $67,000 to sustain KRCH's operations."

9. During the pendency of the assignment application KRCH (FM)'s average monthly revenues approximated only $4,350. In contrast, for the first eleven months of calendar 1971, the monthly revenues averaged about $19,000 per month.

10. In light of these circumstances, Centaur maintains that it was a reasonable expectation "*to be able to activate the Albuquerque station utilizing proceeds from the KRCH sale*" (emphasis added). Centaur states that it never changed its plan of financing KMAP(FM). "Its principals (Mollner and Friedman) advanced or were committed to advance $21,000 to cover the 'start-up' costs of the station. . . . These sums would have been forthcoming. However, because construction was delayed until approximately June 1972, for circumstances beyond Centaur's control, Centaur's principals had 'hoped' to obtain funds for 'start-up' costs from the proceeds of the KRCH sale. This expectation did not constitute a change in the plan of financing. To the contrary, it was fulfillment of the financial plan."

11. In view of the above explanation by Centaur, there appears to be no substantial question concerning assignor's representations which would necessitate a hearing. When Centaur acquired the KMAP(FM) construction permit, it relied on the resources of its principals to meet its financial needs. Since over $67,000 was advanced to the KRCH(FM) operation, it was reasonable and logical for Mollner and Friedman to expect to activate the Albuquerque station utilizing the proceeds from the KRCH(FM) sale. Assignor also adequately explains why the $67,000 was needed for the KRCH(FM) operation although it was represented that KRCH(FM) was enjoying increasing revenues and a positive cash flow. During the pendency of the application for sale of KRCH(FM) to a buyer who proposed to change the program format, the advertisers "left in droves." Mollner and Friedman were forced to cover the advertising losses. Indeed, in a letter dated June 12,

1972, concerning the KRCH(FM) assignment application, assignor's counsel wrote:

> [A]ssignor has undergone severe financial hardship because of the impending assignment and proposed change in program format. Hence, assignor respectfully request the Commission to consider the application as soon as possible.

In view of the foregoing, we conclude that there are no questions of such a serious nature concerning the assignor which would preclude a grant of this application.

SUN COUNTRY'S FINANCIAL QUALIFICATIONS

12. Hubbard questions assignee's financial qualifications. It argues that since Sun Country's balance sheet shows that assignee's AM broadcast station, Station KPAR, Albuquerque, is operating at a loss, the existing capital of $5,000 will not be available for the construction and operation of the proposed FM station. Petitioner further argues that the loans and advances from assignee's stockholders have not been shown to be available since the applicant did not submit signed loan agreements and the balance sheets of the stockholders do not demonstrate their ability to provide the amounts required.

13. In its response and amendments, assignee demonstrates its financial qualifications. The consideration for this transaction is reimbursement of legitimate and prudent expenses to the assignor in the amount of $19,392.20.[1] Assignee's construction costs will be $36,200 and the estimated first year cost of operation is $24,000. In addition, based on the 1973 FCC Form 324 (Confidential) report filed with the Commission for Station KPAR, it is anticipated that this station will show a cash flow loss in 1974.

14. In order to finance the purchase, construction and operation of Station KMAP(FM) assignee relies on a $10,000 escrow deposit, the $9,992.00 excess of current liquid assets over current liabilities indicated on its current balance sheet and stockholder loans to provide the balance. Fred T. Hervey and Sam E. Pendelton submitted a signed loan agreement indicating their willingness to lend Sun Country whatever funds are necessary to construct and operate Station KMAP (FM). The rate of interest will not exceed eight percent and these loans "will not be repaid until the corporation is in a position to do so." Hervey's balance sheet shows $48,472,732 Total Assets, $20,394,210 Current Assets (including $13,021 cash, $3,575 cash surrender value of life insurance and $19,530,186 listed stock), $976,865 Current Liabilities, and $647,969 Deferred Liabilities. Pendelton's balance sheet

[1] In its "Reply to Oppositions to Petition to Deny" Hubbard alleges that Centaur will receive the contract price ($19,392.20) plus $10,000 liquidated damages. Thus, assignor would receive an illegal excessive payment in contravention of the dictates of Section 1.597 of the Commission's Rules. Assignor responded that the contract controls the consideration. The contract provides that the consideration is "such sum as the Federal Communications Commission approves; provided that said consideration will be no greater than the sum which has been previously and prudently expended for and under the CP by the seller." It is therefore clear that assignor would not receive any payment in excess of those "clearly shown to have been legitimately and prudently expended, and to be expended, by the seller solely for preparing, filing, and advocating the grant of the construction permit for the station, and for other steps reasonably necessary toward placing the station in operation." Thus upon consummation the total consideration will be limited to the demonstrated out-of-pocket expenses of $19,392.20. Therefore the consideration is fully consistent with Section 1.597 of the Commission's Rules.

shows $40,482 Total Assets of which $18,226 are Current Assets and $21,004 Total Liabilities of which $8,504 are current.

15. As above indicated Hervey and Pendelton show combined available liquid assets of in excess of $19,000,000. Thus, it is abundantly clear that they have demonstrated their ability to lend Sun Country the funds necessary for the purchase, construction and operation of Station KMAP(FM) as well as the projected cash flow losses of Station KPAR. We, therefore, conclude that, based on these loans and the other available funds, the assignee is financially qualified. *Ultravision Broadcasting Co.*, 1 FCC 2d 544, 5 RR 2d 343 (1965).

ASCERTAINMENT OF COMMUNITY NEEDS

16. Hubbard questions assignee's ascertainment process. It claims that Sun Country has not complied with the Commission's *Primer on Ascertainment of Community Needs by Broadcast Applicants.* Specifically, Hubbard states that Sun Country did not provide the basis for the selection of the community leaders who were interviewed as part of its community needs survey as specifically required by the Commission in Question and Answers 9 and 10 of its *Primer on Ascertainment of Community Needs by Broadcast Applicants.*

17. In its response and a further amendment, Sun Country submitted a showing in support of its determination of the composition of the community. Included in the demographic data submitted by the assignee is current data from the U.S. Census Bureau, the Greater Albuquerque Chamber of Commerce, the Fautus County's Analysis of Albuquerque, New Mexico . . . in 1971, and information from the Employment Security Commission of New Mexico. This information shows the make-up of the Albuquerque community including racial and ethnic composition and other components of the community.

18. Careful review of this material indicates that assignee's submission of demographic data fully complies with Question 9 and 10 of the Commission's *Primer on Ascertainment of Community Needs by Broadcast Applicants.* Sun Country clearly demonstrates sufficient data to support its determination of the composition of Albuquerque, New Mexico. Included in the community leaders interviewed were government, religious, agricultural, business, labor, professional, eleemosynary and minority leaders. The community leaders interviewed do appear to represent a broad cross section of the Albuquerque community. We, therefore, conclude that there is no substantial or material question concerning Sun Country's ascertainment of the needs of Albuquerque, New Mexico and its environs.

CONCLUSION

19. Based upon the above, the Commission concludes that assignor's representations concerning its operation of Station KRCH(FM), St. Louis and its plans to finance the acquisition, construction and operation of Station KMAP(FM), Albuquerque, present no unresolved or material question of fact requiring an evidentiary hearing. We further find that assignee is financially qualified and its ascertainment

of community needs survey is adequate to properly ascertain the needs of its service area.

20. On September 8, 1972 assignor filed an application (BMPH–13,-601) requesting additional time to construct Station KMAP(FM). Assignee states that it will construct Station KMAP(FM) within four months from the date of Commission grant of the assignment of the construction permit, barring bad weather conditions or strikes. We conclude that grant of a four month extension in order to allow the assignee to construct the station is warranted.

21. In view of the foregoing, and based upon a finding that the assignee is legally, financially, technically and otherwise qualified, and that the public interest, convenience and necessity will be served thereby, IT IS ORDERED, that the petition to deny filed by Hubbard Broadcasting, Inc., IS DENIED, that the application for extension of time to construct Station KMAP(FM) IS GRANTED for a period of four months from the date of the release of this Order, and that the application to assign the construction permit of Station KMAP (FM) to Sun Country Radio, Inc., IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74R–207

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of COLORADO WEST BROADCASTING, INC., GLENWOOD SPRINGS, COLO. GLENWOOD BROADCASTING, INC., GLENWOOD SPRINGS, COLO. For Construction Permits	Docket No. 19588 File No. BPH–7646 Docket No. 19589 File No. BPH–7707

MEMORANDUM OPINION AND ORDER

(Adopted June 5, 1974; Released June 7, 1974)

BY THE REVIEW BOARD: BOARD MEMBER KESSLER ABSENT.

1. The mutually exclusive applications of Colorado West Broadcasting, Inc. (Colorado West) and Glenwood Broadcasting, Inc. (Glenwood) for a new FM broadcast station in Glenwood Springs, Colorado, were designated for hearing by Commission Order, FCC 72–836, released September 22, 1972. In an Initial Decision, FCC 73D–66, released January 8, 1974, the Administrative Law Judge granted the application of Colorado West and denied the application of Glenwood; by Memorandum Opinion and Order, 44 FCC 2d 933, —— RR 2d —— (1974), the Commission reopened the record, specified two issues against Colorado West, and remanded the case to the Administrative Law Judge. Now before the Review Board is a petition to enlarge issues, filed February 22, 1974, by Colorado West, requesting inquiries into Glenwood's compliance with Sections 3(o) and 315 of the Communications Act of 1934 and Section 1.526 of the Commission's Rules, Glenwood's purpose for filing its application for a new FM broadcasting station, and Glenwood's qualifications to be a Commission licensee.[1]

2. Colorado West concedes that its petition is untimely, but argues that good cause exists for its acceptance because it did not learn of certain alleged misconduct by Glenwood until February 8, 1974, and did not receive an affidavit attesting to the incidents in question until February 20, 1974, and because it could not discern Glenwood's overall pattern of conduct until recently. The Board does not believe that these arguments constitute good cause for petitioner's tardiness since all of the events cited in the petition occurred well before the document was filed, but we will nevertheless consider the petition on the merits because of the serious nature of the questions raised. See *The Edgefield-Saluda Radio Company*, 5 FCC 2d 148, 8 RR 2d 611 (1966).

[1] Also before the Board are the following related pleadings: comments, filed March 13, 1974, by the Broadcast Bureau; opposition, filed March 22, 1974, by Glenwood; and reply, filed April 11, 1974, by Colorado West.

SECTION 33(o) OF THE COMMUNICATIONS ACT OF 1934

3. Colorado West bases its allegation that Glenwood willfully and repeatedly violated Section 3(o) of the Communications Act of 1934 [2] on the affidavit of Edward M. Dunn, Jr., a former employee of KGLN, the standard broadcast station operated by Glenwood in Glenwood Springs, Colorado. In his affidavit, Dunn states that Glenwood broadcast prerecorded audio tones superimposed over program material to signal KGLN employees who were away from the station. According to the affidavit, Jack E. Warkentin, a principal of Glenwood, told Dunn not to log these messages and also admitted that he knew the practice was illegal. Dunn further maintains that the page cartridges used to signal employees were present at the KGLN studio as late as February 17, 1974. The broadcast of point-to-point communications clearly violates the Communications Act of 1934, Colorado West charges, citing *WANV, Inc.*, —— FCC 2d ——, 27 RR 2d 1607 (1973); *KFAB Broadcasting Co.*, —— FCC ——, 1 RR 2d 403 (1963); *Report and Order in Docket 12517*, 19 RR 1619 (1960); and *Scroggin & Co. Bank*, 1 FCC 194 (1935), and an appropriate issue should therefore be added. The Bureau, in its comments, supports Colorado West's request, arguing that the allegations, if true, would warrant the addition of an issue.

4. Glenwood, in opposition, offers the affidavit of Jack E. Warkentin who states that KGLN did employ a signalling system of audio tones to inform its employees of fast-breaking news stories, equipment malfunctions, and other station business, but discontinued this practice in the fall of 1973. Warkentin also contends that the maximum duration of any signal was approximately one second, that the signals were broadcast on an average of two or three times per month, and that no complaints from the public concerning their use were ever received. Although the tone cartridges containing the signals were erased, the labels on the cartridges were not removed, he submits. Glenwood asserts that KGLN used tone signals as an ancillary function of its broadcast service to the public, and, further, that none of the cases cited by Colorado West, all of which involve the signalling of persons not associated with the station, establish the proposition that this practice violates Commission rules. Indeed, Glenwood urges, the Commission has never issued a forfeiture or designated an issue on this matter. In reply, Colorado West maintains, with the support of a second affidavit of Edward M. Dunn, Jr., that the tones were broadcast significantly more often than two or three times per month, and that Dunn received repeated inquiries from the public concerning the tones.

5. The Review Board will add the requested issue. It has long been considered contrary to the purpose of Section 3(o) of the Communications Act for a broadcast station to transmit point-to-point messages of strictly private interest. See *Scroggin & Co. Bank, supra*. Glenwood has not denied that Station KGLN broadcast point-to-point communications and that its principal, Jack Warkentin, was aware that such activity was prohibited. It appears, however, that this practice

[2] Section 3(o) defines "broadcasting" as "the dissemination of radio communications intended to be received by the public . . .".

at Station KGLN was voluntarily terminated in the past, that the violations were of a limited nature, and that no serious harm to the public interest occurred as a result of them. While these circumstances do not excuse the infraction, we believe it appropriate to add the issue on a comparative basis only.

SECTION 1.526 OF THE COMMISSION'S RULES

6. Edward M. Dunn, Jr., in his affidavit accompanying Colorado West's petition, alleges that although Glenwood was required to file its application for renewal of KGLN's license on or before January 2, 1974, his visit to the station on January 3, 1974, revealed that the public file for the renewal application consisted only of work sheets. According to Dunn, Warkentin's explanation for this situation was that a copy of the application had not yet been sent to him by his Washington counsel. Dunn further states that he was told that the renewal application was still not available on February 11, 1974, and that he was not able to inspect the application at the public file until February 17, 1974. In view of this failure by Glenwood to maintain its local records for public inspection, an appropriate issue should be added, Colorado West submits.

7. Glenwood, through the affidavit of Jack Warkentin, admits that its public file for the renewal of KGLN's license consisted of work sheets rather than a completed application as of January 3, 1974, but argues that the work sheets included all of the data actually submitted to the Commission with the KGLN renewal application. With respect to Dunn's February 11, 1974, visit to the station, Warkentin states that he had received a copy of the renewal application by that date but did not then have a copy of an amendment to the application which was still under review by counsel. This fact was not explained to Dunn, Warkentin contends, because Dunn's visits were openly hostile, and his animosity toward Warkentin quite obvious.[3] Thus, Glenwood argues, Warkentin's actions toward Dunn cannot be considered indicative of a general failure to comply with Section 1.526. Finally, Glenwood states, Glen Allen Lee Bell, President of Colorado West, was given the Glenwood public file without hesitation on a previous occasion and the station has always maintained its files in compliance with Commission rules. The Bureau also opposes the requested issue on the grounds that the alleged violation, even if proven, would not be so serious as to reflect on Glenwood's character qualifications. The Bureau also submits that inquiry into this matter would be more appropriate in connection with KGLN's renewal application, rather than in connection with Glenwood's request for a new FM station.

8. Colorado West, in reply, disputes Glenwood's characterization of its conduct as an isolated incident growing out of the ill-will between Dunn and Warkentin, and asserts that licensees and applicants must maintain public records at all times. Colorado West further charges that Warkentin in his affidavit admits lying to Dunn on February 11, 1974, and that this admission is additional justification for its request.

[3] Dunn had been dismissed from his employment at Station KGLN by Warkentin because of Dunn's alleged failure to follow instructions.

9. The Board does not believe that Glenwood violated Section 1.526 by placing drafts of its renewal application in its public file until the original was received from its attorney. However, we are constrained to point out that Glenwood's principal, Warkentin, committed an error in judgment when he led Dunn to believe that the application was still not available on February 11, 1974. Though some animosity obviously existed between the two men, Dunn's right to inspect the file was no different from that of any other member of the public, and Warkentin was not entitled to mislead Dunn simply because he questioned his motives. At the same time, however, the Board notes that the file was made available to Dunn shortly after the incident in question and to Colorado West's president on a previous occasion, and that the violation was apparently not repeated. In view of these considerations, we cannot conclude that Warkentin's conduct was serious enough to reflect adversely on Glenwood's qualifications to be a Commission licensee; therefore, we will not add the requested issue. See *Mahoning Valley Broadcasting Corp.*, 39 FCC 2d 52, 25 RR 2d 873 (1972).

SECTION 315 OF THE COMMUNICATIONS ACT OF 1934

10. Colorado West next charges that Glenwood has violated the Commission's fairness doctrine on at least two occasions. The first instance cited by petitioner occurred in May, 1973, when KGLN allegedly broadcast a program concerning an underground nuclear blast which was detonated by the Atomic Energy Commission on May 17, 1973, at Rio Blanco, a location approximately 40 miles from Glenwood Springs. The nuclear blast was a controversial issue in the community, Colorado West alleges, but the KGLN program presented only one viewpoint on the topic, in that only representatives of the Atomic Energy Commission and its primary contractor appeared. No one opposing the nuclear blast was presented over KGLN's facilities, petitioner contends. As a second example of Glenwood's alleged failure to deal adequately with controversial issues, Colorado West cites the fact that KGLN did not broadcast President Nixon's July, 1973, speech concerning the Watergate affair, even though the speech was available to the station at 7:00 p.m. local time and the station's license permitted it to operate until 8:00 p.m. during the period in question. Finally, petitioner claims that Warkentin made several statements to Dunn admitting that he conservatively programmed KGLN in order to keep the "John Birch" faction in Glenwood Springs "off his back" and maintain his advertising accounts.

11. Glenwood, in opposition, submits the affidavit of Kenneth W. Duprey, program director of KGLN, who states that the station's program concerning the Rio Blanco nuclear blast included an invitation to the general public to participate by means of pro and con telephone calls on the topic. Glenwood also submits the affidavit of George D. McGibbony, a Glenwood Springs resident, who states that he participated in an open telephone discussion regarding the Rio Blanco nuclear blast presented on KGLN, and that the program consisted of questions phoned in by the public and answers supplied by representatives of the project. Glenwood further argues that Colorado West's contention that KGLN is conservatively programmed is totally un-

supported and alleges that the decision as to whether or not to carry President Nixon's speech was a matter of licensee discretion and not a subject for Commission review. The Bureau also opposes the addition of a fairness doctrine issue. With respect to the Rio Blanco nuclear blast, the Bureau maintains that Colorado West has failed to sustain its burden of setting forth reasonable grounds for concluding that KGLN's overall programming did not present opposing views on the issue in question, citing *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 FCC 598, 2 RR 2d 1901 (1964). The Bureau also argues that the allegation concerning President Nixon's speech is insufficient to raise a fairness doctrine question, since there is no evidence that the station carried any viewpoints about the Watergate affair or aired one viewpoint without airing opposing opinions as well.

12. Colorado West, in reply, submits the affidavit of Barbara M. Snobble, Secretary of the Colorado Sierra Club, which states that KGLN presented only proponents of the Rio Blanco nuclear blast and made no effort to seek out opponents of the project with contrary views. Petitioner also questions Glenwood's discretion in refusing to carry President Nixon's July, 1973, speech, since in its view, this speech marked his first "refutation" of the Watergate allegations. Finally, as evidence of KGLN's conservative programming, Colorado West cites the affidavit of Edward M. Dunn, Jr., which states that Warkentin once ordered Dunn to stop playing a particular record because a potential advertiser did not like the song.

13. The Commission has consistently required fairness doctrine complainants to set forth reasonable grounds for concluding that the licensee in his overall programming has not attempted to present opposing views on the issue in question. See *The Meredith Corp.*, 37 FCC 2d 551, 25 RR 2d 428 (1972); *Applicability of the Fairness Doctrine, supra; Lexington County Broadcasters, Inc.*, 41 FCC 2d 760, 27 RR 2d 1551 (1973). Petitioner here has failed to meet this burden since its allegation that only persons favoring the Rio Blanco nuclear blast appeared on a specific program to answer questions from the public neither proves that the program itself failed to reflect contrary positions nor demonstrates that KGLN's overall coverage of the event failed to include opposing viewpoints on the subject. The affidavit of Barbara M. Snobble does not cure this defect since it contains only general allegations of unfair treatment rather than detailed and documented evidence of noncompliance. In addition, KGLN's alleged failure to contact members of conservation or other specific groups is not itself a fairness doctrine violation since a licensee has considerable discretion as to the techniques, formats and spokesmen to be employed in presenting conflicting viewpoints. See *Applicability of the Fairness Doctrine, supra*, 40 FCC at 608–609, 2 RR 2d at 1913. With respect to the other alleged instances of noncompliance with Section 315, the Board does not believe that KGLN's failure to carry an address by President Nixon in itself raises any fairness doctrine questions and does not consider the general charges of conservative, one-sided programming by KGLN to be sufficiently substantiated or detailed to warrant the addition of the requested issue.

Strike Application

14. Colorado West relies on the following series of events recited in the affidavit of its president, Glen Allen Lee Bell, as evidence of an alleged continuing pattern of conduct on Glenwood's part designed to obstruct or delay the establishment of Colorado West's proposed station: (1) Bell states that Mrs. Joan Warkentin told him in April, 1971, that if Glenwood filed for the available FM frequency in Glenwood Springs, it would be merely to "tie up the channel" and "stop competition." Bell claims that Mrs. Warkentin further expressed the intention to allow a local educational institution to operate the proposed FM station. (2) Bell states that Mrs. Warkentin told him in a March, 1973, telephone conversation that her husband, Jack Warkentin, was "out to stop" William Dunaway (a major stockholder in Colorado West) from obtaining a construction permit for the FM station. (3) Though Glenwood requested a continuance of a hearing scheduled for April 16, 1973, because a death in Mrs. Warkentin's family necessitated a trip to Texas at that time, Bell states that he encountered Warkentin at the Glenwood Springs post office on that date. Bell further states that in the conversation following this meeting, Warkentin said that he did not want Dunaway to "get into Glenwood Springs" with an FM station. (4) Finally, Bell states that in June or July of 1973, he asked Warkentin why Glenwood was trying to implicate him (Bell) in an allegedly illegal translator station operation in Aspen, Colorado, and Warkentin answered that he was "after" Dunaway, not Bell.[4] As further evidence of Glenwood's alleged improper conduct, petitioner contends that although Warkentin has cited the community's need for nighttime broadcasting as one reason for requesting an FM station, he has never operated KGLN for the total permissible period but has instead consistently signed the station on at 6:00 a.m. and off at 7:00 p.m., even during those months when longer hours were permitted. Thus, petitioner urges, Glenwood has no intention of serving this asserted need for nighttime service. Finally, petitioner claims, Glenwood did not request assignment of the FM channel to Glenwood Springs, and did not file its application for the FM channel until sixty days after Colorado West's application was filed. The Bureau supports Colorado West's request and agrees that sufficient grounds exist for adding an issue absent an adequate explanation by Glenwood.

15. Glenwood, in opposition, offers the affidavit of Joan Warkentin who denies ever telling Bell that her husband wished to tie up Glenwood Springs' FM channel or that he was out to stop Dunaway. Glenwood further disputes the allegation that Mrs. Warkentin expressed an intention to let a local college operate the proposed FM station, citing in support her testimony at the hearing held in this proceeding on May 15, 1973, which, it argues, specifically disclaimed such a plan. With respect to the alleged conversations between Bell and Jack Warkentin, Warkentin maintains in an affidavit accompany-

[4] On May 31, 1973, Glenwood filed a petition with the Board requesting the addition of character issues against Colorado West. The basis for the request was the alleged misconduct of Dunaway and Bell in connection with the operation of an unlicensed television translator station in Aspen, Colorado. See the Board's Memorandum Opinion and Order, 42 FCC 2d 417, released August 16, 1973, and the Commission's Memorandum Opinion and Order, 44 FCC 2d 933, released January 28, 1974.

ing the opposition that his statement of April 16, 1973, to the effect that he did not want Dunaway to get the station, meant only that he wished to get it himself; and that his statement in the summer of 1973, that Glenwood's May 31, 1973, petition to enlarge issues was aimed at Dunaway rather than Bell, reflected the fact that the issues raised in the petition primarily involved Dunaway's activities. As for the Warkentins' presence in Glenwood Springs on April 16, 1973, Glenwood argues that it requested a continuance of the hearing scheduled for the week of April 16–20 because Mrs. Warkentin was scheduled for cross-examination at that time, but would have been unable to attend the hearing since her father's death required her to travel to Texas during the week in question. In fact, the Warkentins did drive to Texas on April 18, 1973, and return home on April 24, Glenwood claims, making their request for a continuance entirely appropriate. Turning to the timing of its application, Glenwood argues that Warkentin first discussed the possibility of applying for an FM station with his counsel in March of 1971, but decided to postpone filing an application until he had made a solid broadcast foundation in the community.[5] During that summer, however, Warkentin claims that he learned of Colorado West's proposed application for the only available FM frequency in Glenwood Springs and decided that he could no longer afford to postpone filing his own application since his counsel had advised him that the chances of obtaining a second FM assignment for a community the size of Glenwood Springs were not good.[6] Thus, Warkentin concludes, he began to prepare his FM application, which, because of his later start in gathering the necessary information, was eventually filed subsequent to the filing of Colorado West's application. Colorado West, in reply, urges that the conflicts between the sworn statements of Bell and the Warkentins can only be resolved in a hearing, that Mrs. Warkentin's testimony does not resolve the question of whether Glenwood would permit a local college to operate its station, and that Glenwood has failed to refute the charge that it does not intend to provide nighttime service to Glenwood Springs.

16. The Commission has identified a strike application as one filed with the principal or incidental motive of obstructing or delaying another application, and has specified the following guidelines for making such a determination: (1) the timing of the application, (2) the economic and competitive benefit occurring from the application, (3) the good faith of the applicant, and (4) questions concerning a frequency study. *Grenco, Inc.*, 39 FCC 2d 732, 26 RR 2d 1046 (1973); *Sumiton Broadcasting Co., Inc.*, 45 FCC 2d 933, —— RR 2d —— (1974). Although the Glenwood application in this case was filed subsequent to that of Colorado West, it appears that Glenwood fully intended to apply for an FM facility in Glenwood Springs prior to Colorado West's filing and that its explanation for delay is not unreasonable on its face. Nor do we believe that Gleenwood's reliance on counsel's advice in applying for this particular frequency was unreasonable under the circumstances or in any way indicative of bad

[5] Glenwood acquired Station KGLN, Glenwood Springs, in February, 1971.

[6] With respect to Colorado West's contention that Glenwood did not request the assignment of the available FM channel, Glenwood asserts that the channel had been assigned to the community before the Warkentins arrived.

faith.[7] We also note that, although economic benefit would obviously flow to Glenwood as a result of successful prosecution of its application, this is not a case where a licensee has allegedly induced others to file an application which will improve its own position or hinder that of its competitors. Compare *Sumiton Broadcasting Co., Inc., supra.* Thus, in our view, the crucial question before us is whether or not Glenwood filed its application in good faith. Petitioner's argument that Glenwood acted improperly and in bad faith rests on four statements allegedly made by the Warkentins—three of the statements expressing personal animosity toward William Dunaway and one expressing a desire to prevent competition—plus allegations that Glenwood planned to allow a local college to operate the proposed FM station and did not plan to offer nighttime service to the community.[8] In our view, the latter two allegations rest on supposition rather than fact and lack the evidentiary support necessary to justify the addition of the requested issue. Moreover, we feel that the four statements cited by Bell reflect, at worst, only a personal dislike for Dunaway coupled with a desire for a successful application and not an intent to delay the prosecution of a competing application.[9] Under these circumstances, we cannot find that Colorado West has provided reasonable grounds for raising a substantial question as to whether Glenwood's application was filed in bad faith. In short, we cannot agree with petitioner that the events and allegations upon which it relies form a pattern of conduct on Glenwood's behalf reflecting an intent to delay or impede Colorado West's application, and we will not, therefore, add a strike application issue.

17. Accordingly, IT IS ORDERED, That the petition to enlarge issues filed February 22, 1974, by Colorado West Broadcasting, Inc., IS GRANTED to the extent indicated below, and IS DENIED in all other respects; and

18. IT IS FURTHER ORDERED, That the issues in this proceeding ARE ENLARGED to include the following issue:

> To determine whether Glenwood Broadcasting, Inc. has violated Section 3(o) of the Communications Act of 1934, as amended, by the broadcast of unauthorized audio signals to be utilized as point-to-point communications over the facilities of KGLN, and, if so, to determine the effect thereof on the comparative qualifications of the applicant.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[7] We point out in this regard that it is not an unusual or in itself questionable practice for a standard broadcast licensee in a community to seek the companion FM channel allocated to that community.

[8] The Board believes that the Warkentins have adequately accounted for their presence in Glenwood Springs on April 16, 1973, and will therefore draw no adverse inferences from this incident.

[9] We also note that the Warkentins' alleged statements were made after the date on which the Glenwood application was filed.

104-041—74——4

FCC 74-560

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.202(b), TABLE OF ASSIGNMENTS, FM BROADCAST STATIONS (ENTERPRISE AND GREENVILLE, ALABAMA; BONIFAY, CHIPLEY, AND PENSACOLA, FLORIDA)	Docket No. 19561 RM-1844 RM-1855 RM-1982

MEMORANDUM OPINION AND ORDER

(Proceeding Terminated)

(Adopted May 29, 1974; Released June 3, 1974)

BY THE COMMISSION:

1. The Commission here considers a petition for reconsideration filed by Sunny Hills of Chipley, Incorporated (Sunny Hills), as concerns our action declining to assign Channel 249A to Chipley, Florida, in a Report and Order, adopted in this docket on January 23, 1974 (FCC 74-71, 44 F.C.C. 2d 1056, 1058-9 (1974)).

2. Briefly, the proceeding stems from petitions to assign channels to Enterprise, Alabama, and Pensacola, Florida. Inasmuch as the Enterprise proposal would have precluded channel assignments at Greenville, Alabama, and Chipley, Florida, the Notice of Proposed Rule Making contained a counterproposal to assign a channel to each of the communities of Greenville and Chipley and none to Enterprise. Because this counterproposal conflicted with one of several proposals for assignment of FM channels to Pensacola, the Pensacola proposals were also included in this docket.

3. In studying the record after the comments responsive to the Notice were filed, the Commission determined that by using some different channels from those originally proposed, assignments could be made to all four communities—Enterprise, Greenville, Chipley, and Pensacola. However, this solution to the problem required that the channel selected for the Chipley assignment (Ch. 249A) be used with a transmitter located 7.5 miles southwest of the city. A Request for Supplemental Information, adopted June 21, 1973 (FCC 73-671), invited comments on whether such a site was available. In response, Sunny Hills replied that transmitter sites would be limited, and did not appear interested in using the channel if such an assignment were made. Therefore, in view of our policy of not making FM channel assignments to cities of less than 10,000 in the absence of a demand, we refrained from making an assignment to Chipley (pop. 3,347, 1970 U.S. Census) of Channel 249A at that time, although assignments were made to Enterprise, Greenville, and Pensacola.

4. Sunny Hills filed a timely petition for reconsideration which states that while it would have preferred the assignment of Channel 296A to Chipley (as was proposed in the Notice) it is not adverse to assignment of Channel 249A, which it will apply for and place in operation if its application is granted. In the circumstances, we find that the public interest, convenience, and necessity would be served by presently assigning Channel 249A to Chipley, Florida. We stress, however, that because of requisite mileage spacing to existing Stations WJAD, Channel 247, Bainbridge, Georgia, and WBNX, Channel 251, Andalusia, Alabama, it is necessary for the transmitter for Channel 249A at Chipley to be located at least 7.5 miles southwest of that city, and any applicant for the channel is hereby placed on notice of this requirement.

5. Accordingly, the petition for reconsideration filed by Sunny Hills of Chipley, Incorporated, IS GRANTED.

6. IT IS ORDERED, That effective July 12, 1974, the FM Table of Assignments (Section 73.202(b) of the Commission's Rules and Regulations) IS AMENDED to read as follows with respect to Chipley, Florida:

City:	*Channel No.*
Chipley, Fla	[1] 249A

[1] A site for this channel must be located at least 7.5 miles southwest of the reference point.

7. Authority for the action taken herein is contained in Sections 4(i), 303(g) and (r), 307(b), and 405 of the Communications Act of 1934, as amended.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-558

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.202(b), TABLE OF ASSIGNMENTS, FM BROADCAST STATIONS. (OGALLALA, NEBR.)	Docket No. 20070 RM-1970

MEMORANDUM OPINION AND ORDER AND NOTICE OF PROPOSED RULEMAKING

(Adopted May 29, 1974; Released June 4, 1974)

BY THE COMMISSION:

1. The Commission has before it (a) the Ogallala Broadcasting Company ("OBC") petition for reconsideration of the Commission's September 6, 1973, Memorandum Opinion and Order [42 F.C.C. 2d 720 (1973)] denying its petition for rulemaking, (b) an opposition to the petition for reconsideration filed by Industrial Business Corporation ("IBC") and OBC's reply to the opposition.

2. OBC and IBC for some time have been in a comparative hearing vying for the only FM channel currently assigned to Ogallala, Nebraska. Subsequent to the Commission's Memorandum Opinion and Order denying OBC's rulemaking petition to add a second channel, the Administrative Law Judge in the comparative proceeding issued an Initial Decision favoring the IBC application. Nevertheless, various levels of appeal remain, so it cannot be said that the adjudicatory process of choosing between the applicants is at an end. This is important because of the connection between the hearing and OBC's proposal. When we denied the OBC petition to add a second FM channel, we did not resolve the question of the need for such an assignment. Rather, we did not reach the merits of the proposal itself because OBC was interested in using the channel only if it were unsuccessful in the hearing. Since IBC was unwilling to apply for the proposed channel if it were to be assigned and since no other party had shown an interest, we were being asked to add a channel with no assurance it would be utilized. This we refused to do. Moreover, since the hearing would continue its regular course, it could not be said that making the assignment would speed the process of bringing service to Ogallala. Now, OBC indicates that it has changed its mind and states that it would be ready to amend to the new channel if it is assigned.

3. This change of heart by OBC provides no basis for reversing our earlier action as OBC's new circumstance (its readiness to amend) has always been a matter fully within its control. As a consequence, its petition does not raise the sort of new circumstances in a petition for reconsideration which is referred to in Section 1.106(c)(1) of the Commission's rules.[1] Nor has OBC shown that our previous decision

erroneously disposed of the case based on the facts then before us. Rather, since it seeks reversal based on a new matter which could have been presented earlier and since OBC's election to propose a channel without a commitment to utilize it cannot be simply erased now that its approach did not succeed, there is no basis for altering our previous decision. The choice was OBC's to make and a reversal now would not be sound administrative practice.

4. While OBC's petition for reconsideration has been found to be wanting, there is nothing to prevent it from filing a new petition for rule making based on the same facts and relying on its willingness to amend to the new channel. Little would be accomplished by requiring such a resubmission, as we already have before us essentially all the material which OBC would be called upon to resubmit. Accordingly, we shall not require such a resubmission but instead shall examine the filings in light of OBC's new declaration.

5. On Ogallala's need for another channel, the parties take sharply opposing positions. OBC argues that Ogallala needs a second channel and that it could be provided without significant preclusionary impact. IBC insists that Ogallala is too small to be able to support another station. In its view, if OBC became the licensee, the AM–FM combination OBC would then have, would doom IBC's ability to conduct an independent operation. As important as this point may be, it is not one that has to be resolved before issuance of a Notice of Proposed Rule Making. In fact, we have normally deferred the resolution of such questions to the application stage rather than resolving them in rule making. Even if the matter were to be considered in the rule making context, it need not predate the issuance of a Notice of Proposed Rule Making. Nor, of course, does the issuance of a Notice in any way stand as a finding in favor of the proposal on this score or a rejection of the issue sought to be raised. To the extent that it may be appropriate, the issue can be considered in connection with the Report and Order to be written in this proceeding.

6. On the assignment itself, we believe it useful to entertain comments and with them obtain more specific data on the need for the assignment. From the information now in hand, it appears that the channel could be added, could meet applicable engineering requirements and could avoid significant preclusionary impact. Nevertheless, IBC shall be given an opportunity for rebuttal on the latter point as well as any others it wishes to raise. Under these circumstances we believe that the subject proposal warrants further exploration and we invite the filing of comments on it. Based on the submissions we shall then be able to decide the need for a second FM assignment in this community of 4,976 persons.

7. To avoid any confusion, we shall specify the averments which OBC needs to supply. It needs to confirm its intention to apply for this channel promptly and its intention thereupon to end its efforts to prevail in hearing. Requiring anything less would not serve to aid a prompt inauguration of service at Ogallala but simply would be returning to the original posture we rejected. In effect, OBC would have

[1] That section provides that new circumstances, not previously submitted to the Commission, may be relied on only if they had recently occurred, were unknown and could not have been discovered through ordinary diligence, or if otherwise required by the public interest. None of these apply here.

to agree to effectuate a complete withdrawal (without insisting on compensation via a "buy-out") from the hearing process. Since it is the need of the community for additional service, not OBC's desire to be the party to render it that is at issue, we shall not intervene to specify that the amendment shall be permitted without prejudice nor to provide for the automatic amendment of its application as OBC apparently seeks. That is a matter to be addressed in the normal course of seeking leave to withdraw from the hearing process.

8. *Cut-off procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered, if advanced in reply comments.

(b) With respect to petitions for rule making which conflict with the proposal in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given, as long as they are filed before the date for filing initial comments herein. If filed later than that, they will not be considered in connection with the decision in this docket.

9. In view of the foregoing and pursuant to authority contained in Sections 4(i), 5(d)(1), 303 and 307(b) of the Communications Act of 1934, as amended, and Section 0.281(b)(6) of the Commission's Rules. WE PROPOSE for consideration the following revisions in our FM Table of Assignments (Section 73.202(b) of the Rules) with respect to the city listed below:

City	Channel No.	
	Present	Proposed
Ogallala, Nebr.	228A	221A, 228A

10. IT IS FURTHER ORDERED, That the petition for reconsideration filed by Ogallala Broadcasting Company IS DENIED except to the extent that the relief sought IS GRANTED by the issuance of this Notice of Proposed Rule Making.

11. Pursuant to applicable procedures set out in Section 1.415 of the Commission's Rules and Regulations, interested parties may file comments on or before July 29, 1974, and reply comments on or before August 19, 1974. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings.

12. In accordance with the provisions of Section 1.419 of the Commission's Rules and Regulations, an original and fourteen copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-559

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.202(b), TABLE OF ASSIGNMENTS, FM BROADCAST STATIONS (PARK RAPIDS, ALBANY, SAUK RAPIDS-ST. CLOUD, MINN.; JAMESTOWN, N. DAK.)	Docket No. 19708; RM-1832; RM-2025; RM-2092

REPORT AND ORDER

(Proceeding Terminated)

(Adopted May 29, 1974; Released June 4, 1974)

BY THE COMMISSION:

1. The Commission has before it the Notice of Proposed Rule Making in this proceeding (FCC 73-300, 38 Fed. Reg. 7574), adopted March 13, 1973, and responsive filings by WJON Broadcasting Company ("WJON"), Stearns County Broadcasting Company ("Stearns"), De La Hunt Broadcasting Corp. ("De La Hunt"), Tri-County Broadcasting Company ("Tri-County"), and Triple R. Inc. ("Triple R").

2. At issue in this proceeding is the making (or changing) of various FM assignments in Minnesota and the requiring of a change in frequency by a Jamestown, North Dakota, station. A number of communities are involved and we are presented (by the urgings of the parties or by our own study of the situation) with a number of possible courses of action. To simplify matters, we intend to discuss separately the situations affecting each of the communities instead of discussing the various plans which could be followed. Since the choices are so varied, a plan-by-plan description would be extremely difficult to follow. A review of the respective situations, on the other hand, is readily understandable. Moreover, this organizational approach will help clarify the reasons which have led us to conclude matters as we do as well as to comprehend the relative positions of the contenders. As will become clear, the decision we have reached responds partially if not always fully to the urgings of each of the parties.

3. This proceedings began with the filing of a request by De La Hunt urging us to change the channel assigned to Park Rapids, Minnesota, on which it was operating. De La Hunt argued that such a change was necessary in order to rectify a second harmonic interference problem involving Channel 12 television reception. Thereafter, Stearns urged the making of a first assignment at Albany, Minnesota, and Tri-County made such a request for Sauk Rapids-St. Cloud, Minnesota. Finally, WJON's comments asked that a Class C channel be substituted for

the Class A channel on which it operates at St. Cloud, Minnesota, in competition with a Class C station there. Triple R, as licensee of the Jamestown, North Dakota, station would be affected only if the Park Rapids assignment were changed to Channel 227 and the station there did not also change its site. If Channel 248 were used at Park Rapids instead, or if De La Hunt changed its Park Rapids site, the Jamestown station would be unaffected. We now turn to an examination of the individual cases before us.

4. Albany, a community of 1,599 persons, is served by a daytime-only AM station. Stearns, licensee of this AM station urged a first FM assignment, recommending Channel 249A for the purpose. Channel 288A could be used instead, but it would require use of a site seven miles south of Albany. With its site located there, a station nevertheless could provide the requisite coverage to Albany. Stearns objected, arguing that a second tower would be needed and pointing out that the costs would be greater than if an FM station could be co-located with its AM station. It indicated that it sought reimbursement for some of these costs if Channel 288A were to be assigned instead of Channel 249A. Since a first assignment appears warranted, the question to be decided is which channel to assign.

5. De La Hunt operates an FM station at Park Rapids (population 2,772) on Channel 279. According to De La Hunt, the station has become involved in significant interference problems affecting reception of Station KNMT–TV, Walker, Minnesota, operating on VHF Channel 12. The cause of the difficulty is said to be second harmonic interference which in some cases has been correctable by the installation of traps and in some instances is said to have been proved to be beyond correction. While the various parties express differing views about the magnitude of the problem, we are persuaded that a problem does exist. The question, then, is whether it merits treatment by way of channel reassignment.

6. On the question of substituting FM channels to correct a television interference problem, the Commission has established guidelines on how such requests are to be resolved and has specified the nature of the showing required—*Public Notice*, 6 R.R. 2d 672, 31 Fed. Reg. 2567. The Commission needs to know the nature and extent of the problem, the efforts made to correct it, and the allocations consequences of responding to the request. As the Public Notice indicates is necessary, the proposed change in channel at Park Rapids would not deprive any community of any currently assigned channel, would not substitute a Class A channel for an existing Class B or C assignment and would not simply visit the problem on another future licensee in another community.[1] With these facts in mind, it is clear to us that though the problem may not be of the most serious sort, it nonetheless warrants consideration, for undeniably it is real. In this connection, we are not unmindful of the financial limitations faced by a station licensed to such a small community. Extensive corrective efforts by De La Hunt could well introduce costs of such magnitude as to preclude effective continued operation. To us, the balance in Park Rapids' favor

[1] If Channel 279 is removed from Park Rapids it would become available for use in a number of communities where Channel 12 is not received and thus where a similar problem would not be expected to occur.

is tipped by these facts, especially since all our assignment tests have been met.

7. Two channels could be utilized in Park Rapids instead of Channel 279. Instead of Channel 248 requested by De La Hunt, Channel 227 could be used. In one sense the situation resembles the one which would face Albany in terms of the need for a separate site. Here too a change in site would be required if Channel 227 were assigned to Park Rapids or if De La Hunt continued with its present site it would have to reimburse the licensee of the Jamestown station for a change in its frequency. Either, De La Hunt asserts, would be beyond its resources.

8. WJON operates on a Class A channel at St. Cloud, a city of 39,691 persons. The other local FM station is a Class C operation. WJON urges us to de-intermix the channels at St. Cloud by substituting Channel 251 for its present Channel 269A. According to WJON, significant first or second FM service would result from the commencement of a Class C operation as it proposes.

9. Tri-County seeks Channel 251 for Sauk Rapids, a community of 5,051, to bring its first FM local service. Since Sauk Rapids is a contiguous to St. Cloud, it is Tri-County's approach to have the channel assigned on a hyphenated basis. This assignment it sees as an important one to serve underserved outlying areas. In effect, its argument is not unlike that of WJON.

10. While the merits of the various proposals are not on equal footing, each has much to recommend it. Recognition of this fact led us to explore the matter by conducting our own study to determine if there were a way to respond in full to the urgings of all the parties, or if not, to at least respond substantially. Happily, there is such an approach which gives each party much or all of what it requested.[2] Under this approach Albany obtains a channel as does Sauk Rapids, St. Cloud's intermixture is ended, and Park Rapids' interference problems are rectified. Finally, no other channel changes will be required, so the Jamestown station need not change its channel.

11. In order to accommodate all of the proposals, it has not been possible to respond fully to the preferences of all of the parties. Thus, while we understand Stearns' preference for the assignment of Channel 249A at Albany, because of the convenience of co-location, doing so would force a denial of other requests. Therefore, we shall assign Channel 288A. The reimbursement Stearns asks if this occurs is not appropriate. It is not an operating station suffering a cost and obtaining no benefit. The premise on which operating stations, forced to a new channel, are reimbursed, is inapplicable here, for unlike such cases, Stearns can decide on whether to go ahead or not. Even if it does not proceed, no existing service would be lost. Stearns will have to decide on whether it wishes to proceed on this basis. If it does not, another party may wish to, and the site question has no pertinency to such a party. While Stearns may see our decision as harsh, the facts dictate such an outcome. It is not always possible to provide an FM channel where it is desired, especially to so small a community. We can do so here but that action has to be balanced with other needs and the result is assignment of Channel 288A.

[2] Canadian concurrence has been obtained in this connection.

12. Park Rapids is larger, its service already in existence and relied upon by the public. To us, especially considering the station's wide area coverage, we think it preferable to assign Channel 248 and not impose the costs of a site change or of reimbursement to Jamestown. To impose these costs is to offer relief that is only a fiction. Moreover, the risk of interruption of a service on which residents of a large area rely cannot be ignored. Accordingly, the station's license will be modified to specify Channel 248.

13. We consider the communities of St. Cloud and Sauk Rapids together because of their proximity. While we could assign Channel 251 to either of them or to them both on a hyphenated basis, such an approach does not respond to the needs of both communities. St. Cloud is a city of almost 40,000 that warrants two FM assignments. Although it has them, one is a Class A, so that a competitive imbalance is unavoidable. In such a situation, an effect on the public is to be expected. If, for de-intermixture purposes and to extend a needed signal to unserved or underserved areas we substituted Channel 251 for WJON's Channel 269A, what then of Sauk Rapids needs? Sauk Rapids, though being much smaller, is somewhat in the shadow of St. Cloud. Its size does not commend it as the preferable location for a Class C assignment, if a choice has to be made. Does this mean that Sauk Rapids is to be ignored? Fortunately not. Channel 269A now used at St. Cloud could be used at Sauk Rapids. The need at Sauk Rapids is not so much in terms of reception service—wide coverage channels are more appropriately assigned at St. Cloud—as in terms of transmission service. A Class A channel could respond to the transmission needs of Sauk Rapids and environs without interfering with other needed assignments. Treated separately, it is large enough to warrant a Class A channel. If Sauk Rapids and St. Cloud were considered together, the total population would not ordinarily mean more than two assignments. To us this is not an equitable result, for we believe that Sauk Rapids requires separate consideration. Therefore, we will modify WJON's license to specify Channel 251 and assign its present channel, 269A, to Sauk Rapids.

14. Accordingly, IT IS ORDERED pursuant to the authority contained in Sections 4(i), 303(g) and (r), 307(b) and 316 of the Communications Act of 1934, as amended, the FM Table of Assignments (Section 73.202(b) of the Commission's Rules and Regulations) IS AMENDED, effective July 12, 1974, as concerns the cities listed below, as follows:

City:	*Channel No.*
Albany, Minn	288A
Park Rapids, Minn	248
St. Cloud, Minn	251, 284
Sauk Rapids, Minn	269A

15. IT IS FURTHER ORDERED, That effective July 12, 1974, and pursuant to Section 316 of the Communications Act of 1934, as amended, the outstanding license held by WJON Broadcasting Company, for Station WJON–FM, St. Cloud, Minnesota, is MODIFIED to specify operation on Channel 251 in lieu of Channel 269A subject to the following conditions:

(a) The licensee shall inform the Commission in writing not later than the effective date herein of its acceptance of this modification.

(b) The licensee shall submit to the Commission by August 12, 1974, all necessary information complying with the applicable technical rules for modification of authorization to cover the operation of Station WJON–FM on Channel 251 at St. Cloud, Minnesota.

(c) The Commission will notify the licensee when a construction permit has been granted for the use of Channel 269A at Sauk Rapids, Minnesota. The licensee may continue to operate on Channel 269A under the outstanding authorization until the Sauk Rapids permittee is ready to operate on Channel 269A or it may effect the change to Channel 251 at any time prior thereto if it should so desire. Ten days prior to commencing operation on Channel 251, the licensee shall submit the same measurement data normally required in an application for an FM broadcast station license.

(d) The licensee shall not commence operation on Channel 251 until the Commission specifically authorizes it to do so.

16. IT IS FURTHER ORDERED, That effective July 12, 1974, and pursuant to Section 316 of the Communications Act of 1934, as amended, the outstanding license held by De La Hunt Broadcasting Corp. for Station KPRM–FM, Park Rapids, Minnesota, IS MODIFIED to specify operation on Channel 248 in lieu of Channel 279 subject to the following conditions:

(a) The licensee shall inform the Commission in writing no later than the effective date herein of its acceptance of this modification.

(b) The licensee shall submit to the Commission by August 12, 1974, all necessary information complying with the applicable technical rules for modification of authorization to cover the operation of Station KPRM–FM on Channel 248 at Park Rapids.

(c) The licensee may continue to operate on Channel 279 under the outstanding authorization until April 1, 1975, or it may effect the change to Channel 248 at any time prior thereto if it should so desire. Ten days prior to commencing operation on Channel 248, the licensee shall submit the same measurement data normally required in an application for an FM broadcast station license.

(d) The licensee shall not commence operation on Channel 248 until the Commission specifically authorizes it to do so.

17. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of this Report and Order by Certified Mail, Return Receipt Requested, to WJON Broadcasting Company, licensee of Station WJON–FM, St. Cloud, Minnesota, and to De La Hunt Broadcasting Corp., licensee of Station KPRM–FM, Park Rapids, Minnesota.

18. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-571

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF GARDEN OF THE GODS BROADCASTING CO., LICENSEE OF RADIO STATION KCMS-FM, MANITOU SPRINGS, COLO.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted May 30, 1974; Released June 4, 1974)

BY THE COMMISSION: COMMISSIONER LEE NOT PARTICIPATING.

1. The Commission has under consideration (1) its Notice of Apparent Liability for forfeiture dated January 17, 1973 (mailed January 18, 1973), addressed to Garden of the Gods Broadcasting Company, licensee of Radio Station KCMS-FM, Manitou Springs, Colorado and (2) the licensee's response of February 12, 1973 to the Notice of Apparent Liability.

2. The Notice of Apparent Liability for $500 was issued for willful or repeated violation of Section 73.217(b) of the Commission's Rules in that the licensee conducted program tests with new equipment from January 18 through 28, 1972, without prior authority of the Commission; and violation of Section 73.216(a) in that the licensee failed to notify the Engineer in Charge at Denver and the Commission in Washington before commencing equipment tests on January 18, 1972.

3. In response to the Notice of Apparent Liability, the licensee explained the circumstances surrounding its installation of and commencement of operation with its new antenna. The licensee stated that the new antenna was required to replace one destroyed by fire, and that immediately prior to the time of the violations, the station was operating with reduced power under Commission authority. It stated:

> The system was ready for application of power only about twenty-four hours before expiration of the FCC permission to operate at reduced power. Under this short deadline and in an effort to avoid a shutdown of broadcasting service to the community upon imminent termination of low power authority, the former station engineer states that he immediately placed a telephonic application with the FCC for temporary program test authorization, i.e., to transfer current programming onto the new antenna. He then applied power to the new antenna and notified the Commission of the resumption of operation of KCMS-FM at full licensed power. There appears no intention here of doing anything illegal as is evident by the engineer's full disclosure to FCC of exactly what he was doing at the precise time that he did it. His stated rationale for these actions was that since this was not operation at a new frequency or power, or with a new program format, he did not believe it to be a new service or a major change in the overall transmitting system, but merely a resumption of service under the identical conditions authorized by the station license for many years. It was deemed that really no period of formal equipment tests was necessary since the antenna was the only new piece of equipment, and that the transmitter itself was a known

quantity. Accordingly, our engineer considered that his application for a temporary program test authorization covered him and the licensee under the peculiar circumstances existent, and could be condoned under Section 1.542(e) as a temporary request necessitated as the end result of equipment damage or failure, without strict regard for procedural requirements. As an indication of the emergency nature of the situation, barring such action of the engineer it would appear that suspension of FM service to the community would have been the only possible alternative.

The licensee further stated that ". . . whereas a technical violation may have occurred, there was certainly no willful or repeated intent on the part of the licensee or his representatives to violate the Commission's Rules," and that the forfeiture would impose a genuine hardship on the licensee. The licensee requested that it be relieved of liability.

4. Commission files reveal that by letter dated January 18, 1972, the licensee notified the Engineer in Charge of the Denver District Office that it had commenced operation with 50 kilowatts ERP and that it was no longer operating at reduced power as provided by its temporary authorization. In its letter the licensee requested temporary authority to operate with its ". . . new antenna and power pending receipt of the necessary modified license," and requested forms for applying for the license. By letter of January 20, 1972 the Engineer in Charge provided the requested forms, informed the licensee that authorization for operation at variance with the terms of its present license must be obtained from Washington, and stated that program test authority for operation in accordance with the terms of its construction permit must also be obtained from Washington. The files also reveal that program test authority for the new facilities was not granted until February 15, 1972.

5. We find that the licensee violated Sections 73.216(a) and 73.217(b) of the Rules from January 18 to the day of the inspection, January 28, 1972. A "telephonic application with the FCC for temporary program test authorization" or written notification to the Engineer in Charge does not meet the requirements of the Rules. Section 73.217(b) provides that program tests shall not commence until specific Commission authority is received, and 73.216(a) requires notification of both the Commission in Washington and the Engineer in Charge of the radio district in which the station is located before commencing equipment tests. Because the violations were repeated, we need not find them to have been willful. *Paul A. Stewart*, 45 FCC 773 (1963). Licensee's contention that its actions could be "condoned under Section 1.542(e)" is not persuasive since operation with the new antenna was not necessitated by equipment damage or failure.[1] Prior to installation of the new antenna licensee had been operating under temporary authority and could have requested extension of that authority. However, in light of the licensee's serious financial condition, we have determined to reduce the amount of the forfeiture to $250.

6. In view of the foregoing, IT IS ORDERED, That Garden of the Gods Broadcasting Company, licensee of Radio Station KCMS–FM, Manitou Springs, Colorado, FORFEIT to the United States the sum of two hundred fifty dollars ($250) for repeated violation of Sections

[1] Section 1.542(e) provides that, "Request for temporary operation necessitated by equipment damage or failure may be made without regard to the procedural requirements of this section."

73.216(a) and 73.217(b) of the Commission's Rules. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument payable to the order of the Federal Communications Commission. Pursuant to Section 504(b) of the Communications Act of 1934, as amended, and Section 1.621 of the Commission's Rules, an application for mitigation or remission of forfeiture may be filed within 30 days of receipt of this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-554

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of AMERICAN TELEVISION AND COMMUNICATIONS CORP., D.B.A. GENERAL TELEVISION OF OSCODA, OSCODA TOWNSHIP, MICH. For Certificate of Compliance	CAC-2134 (MI001)

MEMORANDUM OPINION AND ORDER

(Adopted May 29, 1974; Released June 5, 1974)

BY THE COMMISSION:

1. On March 11, 1973, American Television and Communications Corporation, d/b/a General Television of Oscoda (ATC), filed the above-captioned application for a certificate of compliance. ATC operates a 5-channel cable television system at Oscoda Township, Michigan, which has a population of 4202. Oscoda Township is located outside all television markets. The system currently provides its 1600 subscribers with the following television broadcast signals:

WJRT-TV (ABC, Channel 12), Flint, Michigan
WEYI-TV (CBS, Channel 25), Saginaw, Michigan
WWTV (CBS, Channel 9), Cadillac, Michigan
WNEM-TV (NBC, Channel 5), Bay City, Michigan
WUCM-TV (Educ., Channel 19), University Center (Bay City), Michigan

Certification is sought pursuant to Section 76.11(c) of the rules. ATC has received a new franchise which complies with Section 76.31 of our rules. Rust Craft Broadcasting Company, licensee of Station WEYI-TV, Flint-Bay City-Saginaw, Michigan, has filed an opposition to ATC's application and has petitioned the Commission for special relief, requesting that we require ATC to provide WEYI-TV program exclusivity protection on its Oscoda Township system against the duplicating signal of Station WWTV.

2. WEYI-TV is not otherwise entitled to program exclusivity protection on the Oscoda Township system. Section 76.91(a) of our rules provides that a cable television system operating in a community within the Grade B contour of a television broadcast station shall, on that station's request, maintain its exclusivity against duplicating signals of lower, but not equal, priority. WEYI-TV does not place a predicted Grade B contour over Oscoda Township, nor is its signal of a higher priority than that of WWTV; both are distant signals and therefore of equal priority. However, Rust Craft argues that special relief is warranted in this case. Rust Craft notes that WNEM-TV, the NBC affiliate licensed to Bay City, is entitled to exclusivity protection

on the Oscoda Township system pursuant to Section 76.91 of our rules and therefore WEYI–TV, as a competing station licensed to the same television market, should receive similar protection. Rust Craft also argues that because WEYI–TV is the only station whose programming is subject to duplication on the system it suffers the sole competitive disadvantage among the other Flint-Bay City-Saginaw market signals offered. Stressing WEYI–TV's UHF status, Rust Craft contends that the Flint-Bay City-Saginaw market situation is further exacerbated by the competition of CBS affiliates from Lansing and Cadillac. In this context Rust Craft points to note 2 of Appendix B of the Commission's August 5, 1971, *Letter of Intent* which, in reference to the Flint-Bay City-Saginaw market situation, states that ". . . certain markets do not follow the usual pattern and . . . special treatment might, on further consideration, be appropriate. These include markets in which a great number of overlapping market signals meet the significant viewing test." In sum, Rust Craft avers it has an "equitable priority" over WWTV which ought to be recognized by the Commission in its grant of special relief.

3. We do not believe that the facts in the instant case demonstrate that special relief is warranted. Rust Craft's arguments would be compelling if ATC's system were located in the Flint-Bay City-Saginaw market, but it is not. Oscoda Township is outside all markets, and Rust Craft's arguments are inapposite when applied to Oscoda Township. Rust Craft's noting of the competition posed by the distant CBS affiliates and its reference to the *Letter of Intent* would only be pertinent if ATC's system were located in the Flint segment of the hyphenated market, because this is the only portion of that market in which the distant CBS affiliates referred to are significantly viewed. They are not significantly viewed in Oscoda Township, and, more importantly, neither is WEYI–TV. Moreover, ARB market survey data indicate that WWTV is more widely viewed in Iosco County, where Oscoda Township is located, than is WEYI–TV. Rust Craft's argument that, "as a station in a designated community in the same market as WNEM–TV, WEYI–TV must be afforded the same exclusivity rights as WNEM–TV on the Oscoda system," similarly obscures the facts and misstates Commission policy in this case. While it is true that WNEM–TV and WEYI–TV are in the same market, the Oscoda Township system is not; further, WNEM–TV is significantly viewed in Iosco County and WEYI–TV, as we have noted, is not. The Commission's purpose in applying the program exclusivity rules is not to give a particular station a competitive advantage which it would not otherwise have, but rather to refrain from imposing upon it a competitive disadvantage caused by the sudden influx of duplicating signals. Because WEYI–TV is not significantly viewed off-the-air in Isoco County, it cannot be argued that the unduplicated carriage of the NBC and ABC affiliates, which are significantly viewed, subjects it to a competitive disadvantage. In light of these facts we must regard Rust Craft's bare allegation that the requested waiver is necessary "to protect the continued existence of WEYI–TV as a viable broadcasting enterprise" as unsubstantiated. Nor is WEYI–TV's UHF status decisive in itself. The Commission quite clearly stated in *Danville Cablevision Com-*

pany, 44 FCC 2d 554 (1973), that a station's UHF status is irrelevant in program exclusivity considerations. We said in *Danville*, "... though the *Cable Television Report and Order* explicitly gave UHF stations favorable treatment in terms of carriage, it did not articulate any comparable policy in terms of exclusivity." Rush Craft has presented no compelling facts to persuade us that a departure from our policy is called for here.

In view of the foregoing, the Commission finds that a grant of the subject application for certificate of compliance would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Objection to Application for Certificate of Compliance and Petition for Special Relief" filed by Rust Craft Broadcasting Company, IS DENIED.

IT IS FURTHER ORDERED, That the "Application for Certificate of Compliance" (CAC–2134) filed by American Television and Communications Corporation d/b/a General Television of Oscoda, IS GRANTED, and an appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

104-041—74——5

FCC 74-552

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of GULF COAST-BELLAIRE CABLE TELEVISION, BELLAIRE, TEX. For Certificate of Compliance	CAC-1684 TX302

MEMORANDUM OPINION AND ORDER

(Adopted May 29, 1974; Released June 5, 1974)

BY THE COMMISSION:

1. The Board of Regents of the University of Houston, licensee of Television Broadcast Station KUHT, a Houston, Texas, educational television station, has filed a petition for rehearing or reconsideration of the Commission's decision in *Gulf Coast-Bellaire Cable Television*, FCC 73-256, 40 FCC 2d 981 (1973). Specifically, the Board wishes that decision set aside or modified to the extent that it authorizes the carriage of Station KLRN-TV, San Antonio, Texas, a distant educational television signal, into Bellaire, Texas, a community located in the Houston major television market (#15). While acknowledging its failure to participate in the earlier stages of this proceeding, the Board submits that the public interest is best served if KLRN-TV's programming is not available to subscribers of the proposed cable television system. Two principal arguments are advanced in support of this contention: (a) KLRN-TV's programming, particularly its instructional service, substantially duplicates that of KUHT; (b) The importation of KLRN-TV will fragment KUHT's sources of local support and funding.

2. KUHT was notified of Gulf Coast-Bellaire's application for a certificate of compliance when that application was filed with the Commission. However, the Board states that no action was taken at that time because the position of "local institutional counsel" was then vacant. Such counsel was eventually obtained, but before he had an opportunity to consider the implications of this notification, the time for filing objections had passed. In response, Gulf Coast-Bellaire argues that the Board had "ample time and notice" to participate in the initial proceedings concerning this application and, therefore, the requirements of Section 1.106(b) of the Rules have not been satisfied. Additionally, Gulf Coast-Bellaire argues that the petition for reconsideration was not timely filed and must be dismissed. In any event, Gulf Coast-Bellaire contends that the Board's substantive arguments are without merit.

3. Since the notification of Gulf Coast-Bellaire's application required by Section 76.13(a)(6) of the Rules was mailed to KUHT on December 6, 1972, and public notice of its filing appeared on January 5,

1973, approximately two months were available to the Board in which to submit an appropriate response. The initial action was taken on March 7, 1973, without the Board's participation. Thereafter, on March 28, 1973, the Cable Television Bureau received an "Objection of the Board of Regents of the University of Houston Pursuant to Section 76.27 or Petition for Special Relief Pursuant to Section 76.7." On March 29, 1973, the Chief, Cable Television Bureau, advised the Chairman of the Board of Regents of the University of Houston, that this "Objection" was not timely filed in view of the Commission's recent action on the application. However, the Chairman of the Board of Regents was informed that Section 405 of the Communications Act of 1934, as amended, permits reconsideration of such actions. The provisions of Section 1.106 of the Commission's Rules, which implement Section 405 of the Communications Act, were enclosed with the letter of the Bureau Chief, which also stated that a petition for reconsideration must be filed within 30 days of the date the text of the decision was released (the Commission released the text of *Gulf Coast-Bellaire Cable Television* on March 14, 1973). Despite this cautionary advice, the Board did not submit its petition for reconsideration until April 16, 1973. Consequently, the clear statutory mandate of Section 405 of the Communications Act has not been observed, and the petition for reconsideration must be dismissed.[1]

4. Notwithstanding these procedural deficiencies, the Commission has considered the Board's argument as if it were a petition for special relief to determine whether the public interest would be served if the relief requested were provided. One of the objectives of the signal carriage rules is "the widest possible dissemination of educational and public television programming."[2] Local educational stations can effectively challenge the carriage of distant educational signals with a timely filed objection supported by probative evidence.[3] However, the Board's fear of an erosion of local support among cable television subscribers is unsupported by evidence of any sort and must be dismissed as mere speculation. Similar arguments were advanced in *Mission Cable TV, Inc.*, FCC 73–395, 40 FCC 2d 705 (1973), and were similarly rejected. Moreover, there are "countervailing considerations" present here, not unlike those we found decisive in *Orange Cablevision, Inc.*, FCC 73–76, 39 FCC 2d 71 (1973). As in that case, the Commission has authorized the carriage of a distant educational signal while the local educational station has seemingly assented to such carriage by its silence. Now that station wishes to disturb the earlier ruling, without adequately justifying its earlier absence[4] and without demonstrating that the public interest would be served thereby. Finally, the Board's observation that carriage of KLRN–TV in the

[1] Section 405 of the Communications Act of 1934, as amended, provides in part: "A petition for rehearing must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of." Compare *In re Complaint of Sidney Williams and Russell Millin*, FCC 72–1112, 38 FCC 2d 443 (1972), which similarly dismissed an untimely filed petition for reconsideration.

[2] Paragraph 95, *Cable Television Report and Order*, FCC 72–108, 36 FCC 2d 143, 180 (1972).

[3] *Norristown Distribution Systems, Inc.*, FCC 72–1095, 38 FCC 2d 350 (1972).

[4] While the Board of Regents alludes to the lack of local institutional counsel, it explains only generally the difficulties created by the absence of such counsel. Nothing is said concerning the date counsel was retained or the special problems he may have encountered with respect to the application of Gulf Coast-Bellaire.

Houston market will produce a duplication of in-school instructional programming is, in itself, an insufficient reason to limit the availability of that signal. The impact of such programming upon the service provided by a long-established VHF educational television station would be minimal, particularly because KUHT will receive the benefits of exclusivity protection against KLRN–TV's duplicating programming.

In view of the foregoing, the Commission finds that its action in *Gulf Coast-Bellaire Cable Television*, FCC 73–256, 40 FCC 2d 981 (1973), was consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Motion or Petition for Rehearing or Reconsideration of the Objection of the Board of Regents of the University of Houston" filed April 16, 1973, by the Board of Regents, University of Houston, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-567

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of HOUMA CABLEVISION, INC., HOUMA, LA. For Certificate of Compliance	CAC-2295 LA013

MEMORANDUM OPINION AND ORDER

(Adopted May 30, 1974; Released June 6, 1974)

BY THE COMMISSION: COMMISSIONER REID DISSENTING; COMMISSIONER QUELLO NOT PARTICIPATING.

1. Houma Cablevision, Inc., operates a cable television system in the above-captioned community. The system presently carries the following television broadcast signals:[1]

WBRZ (NBC, Channel 2), Baton Rouge, Louisiana
WAFB-TV (CBS, Channel 9), Baton Rouge, Louisiana
WWL-TV (CBS, Channel 4), New Orleans, Louisiana
WDSU-TV (NBC, Channel 6), New Orleans, Louisiana
WVUE (ABC, Channel 8), New Orleans, Louisiana
WGNO-TV (Ind., Channel 26), New Orleans, Louisiana
WYES-TV (Educ., Channel 12), New Orleans, Louisiana
KATC (ABC, Channel 3), Lafayette, Louisiana
KLFY-TV (CBS, Channel 10), Lafayette, Louisiana
KHMA[2] (Ind., Channel 11), Houma, Louisiana

Houma has filed an application for a certificate of compliance to add the following signal:

WRBT (ABC, Channel 33), Baton Rouge, Louisiana

2. In its original application, Houma Cablevision stated that it was within a smaller television market—that of KHMA, Houma, Louisiana—and thus requested a waiver of Section 76.59 of the Commission's Rules in order to add the desired signal. This original application was unopposed. In an amendment to its application. Houma Cablevision now claims that it is outside of all television markets because the broadcast station licensed to Houma, Louisiana has ceased operations due to financial difficulties.[3] This amendment is opposed in a letter to the Commission by the Receiver in Bankruptcy for KHMA.

3. In his opposition, the Receiver in Bankruptcy urges us to reject the contention of Houma Cablevision that a television market no

[1] The Houma system commenced operations in October, 1964, and has 12-channel capacity. The population of Houma is 45,000; there are 4,000 cable subscribers.
[2] Currently dark.
[3] If Houma is outside all markets, carriage of the requested signal would be consistent with Section 76.57 of the Rules.

longer exists in the community.[4] In support thereof he states that the United States District Court for the Eastern District of Louisiana has ordered that the assets of KHMA be sold to La Terr Broadcasting Corporation, subject to approval by the Commission, and, accordingly, KHMA will be an operating station again in the near future.

4. The designation of a cable system as within a television market is dependent upon its location in whole or in part within the specified zone of a television broadcast station licensed to a community. Section 76.5(f) of our Rules defines the specified zone of a television broadcast station as "the area extending 35 air miles from the reference point in the community to which the station is licensed or authorized by the Commission." Houma Cablevision's system is obviously within 35 air miles of the reference point for Station KHMA. However, because KHMA is not presently broadcasting, it technically has no specified zone,[5] although it remains a television broadcast station licensed to Houma. Because of the assurances of the Receiver in Bankruptcy concerning KHMA's return to operation, we are not prepared to find that the community of Houma, Louisiana, is located outside of all television markets. However, since KHMA is not presently operational, has been silent for more than six months, and because its possible return to the air remains indefinite, we will grant a waiver of Section 76.59 of the Rules to allow Houma Cablevision to add the requested signal. In this regard, we note that the original application of Houma Cablevision to carry WRBT was unopposed by KHMA and that there has been no change in the original application. In addition, the letter filed by the Receiver in Bankruptcy is intended more as an opinion of the status of KHMA than as an opposition to the proposed signal carriage of Houma Cablevision. Consistent with Houma Cablevision's undertaking in its waiver request, authorization to add WRBT is subject to the condition that, in the event that KHMA returns to the air, Houma Cablevision shall delete one of the ABC-affiliated stations that it is now authorized to carry (WVUE, KATC, or WRBT).

In view of the foregoing, we find that a grant of the above-captioned application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the application for certificate of compliance filed April 2, 1973, by Houma Cablevision IS GRANTED, subject to the condition stated in paragraph 4 above, and the appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[4] The Commission originally authorized KHMA to "go dark" for the period of October 15, 1973, through January 14, 1974. On May 15, 1974 the Commission granted a further authorization for KHMA to remain silent through August 12, 1974.

[5] See the *Cable Television Report and Order*, FCC, 72-108, 36 FCC 2d 143, 172 n. 39 (1972).

FCC 74-599

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF H.R.H., INC., LICENSEE OF RADIO STATION WIVI-FM, CHRISTIANSTED, ST. CROIX, VIRGIN ISLANDS
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted June 5, 1974; Released June 10, 1974)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE NOT PARTICIPATING.

1. The Commission has under consideration its Notice of Apparent Liability dated August 2, 1973, (mailed August 7, 1973) addressed to H.R.H., Incorporated, licensee of Radio Station WIVI-FM, Christiansted, St. Croix, Virgin Islands.

2. The Notice of Apparent Liability in the amount of $1,000 was issued because of the licensee's apparent violation of Section 1304, Title 18, U.S. Code, in that the licensee broadcast information concerning a lottery at the times set forth in the attached APPENDIX. The following announcements were broadcast in rotation during the period July 7 through August 15, 1972:

ANNOUNCEMENT (A)

J & B SCOTCH

WIN WITH A WINNER----------
J & B RARE SCOTCH WHISKEY----------
AND WIN THE J & B ROLLS ROYCE----------
YES, J & B IS GIVING AWAY ITS SILVER CLOUD ROLLS ROYCE AND YOU CAN WIN IT----------
TO GET ALL THE DETAILS----------
JUST LOOK FOR THE J & B ROLLS ROYCE CONTEST POSTER AT YOUR FAVORITE LIQUOR STORE OR SUPERMARKET----------
THE DRAWING IS AUGUST 16th----------
YOU CAN ALSO WIN----------
ONE OF 25 OTHER PRIZES, ONE CASE EACH OF J & B----------
ENTER OFTEN----------
ENTER NOW----------
J & B GIVES YOU NOTHING BUT THE BEST----------

ANNOUNCEMENT (B)

J & B SCOTCH

WOULD YOU LIKE TO BE A WINNER, BABY?----------
SURE, BABY----------
WELL, J & B HAS SOMETHING SPECIAL FOR YOU----------
YEAH? AND WHAT'S THAT?----------
JUST THE J & B ROLLS ROYCE----------

NO JIVE
UH, UH, THE ROLLS ROYCE
DIG IT
STOP BY YOUR FAVORITE LIQUOR STORE OR SUPERMARKET FOR ALL THE DETAILS
AND WHEN'S THE DAY?
AUGUST 16th
ENTER NOW?
YEAH, ENTER OFTEN. J & B GIVES YOU NOTHING BUT THE BEST
YEAH

3. Prior to the issuance of the Notice of Apparent Liability in a July 20, 1973 letter licensee stated:

> We have determined that it was necessary to purchase a package of J & B in order to get an entry form for the drawing of the automobile and other prizes. The winning entries were drawn by chance over WBNB–TV, Charlotte Amalie, and apparently all prizes were awarded.

4. The Notice of Apparent Liability was mailed to the licensee on August 7, 1973 by Certified Mail—Return Receipt Requested. Although the return receipt indicated that the licensee received the Notice on August 10, 1973, the Commission's records indicate that the licensee failed to reply to the Notice within the thirty-day period prescribed by Section 1.621 of the Commission's Rules, and has not replied subsequent to the expiration of the thirty-day period.

5. We find that this promotion constituted a lottery, since all of the elements (prize, chance and consideration) were present. The prizes were cases of whiskey and a Rolls Royce automobile, the winners were selected by a drawing, and consideration was present, since all participants were required to make a purchase. We also find that the licensee violated Section 1304, Title 18, U.S. Code in broadcasting the announcements for J & B Scotch during the period August 7, 1972 through August 15, 1972.

6. In accordance with the provisions of Section 503(b) of the Communications Act of 1934, as amended, and Section 1.621[1] of the Commission's Rules, IT IS ORDERED, That H.R.H., Incorporated, licensee of Radio Station WIVI–FM, Christiansted, St. Croix, Virgin Islands, FORFEIT to the United States the sum of one thousand dollars ($1,000) for violation of Section 1304, Title 18, U.S. Code. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument drawn payable to the order of the Federal Communications Commission. Pursuant to Section 504(b) of the Communications Act of 1934, as amended, and Section 1.621 of the Commission's Rules, an application for mitigation or remission of forfeiture may be filed within thirty days of receipt of this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

[1] Section 1.621 of the Commission's Rules provides, in pertinent part, as follows: "If the licensee . . . fails to take any action in respect to a notification of apparent liability for forfeiture, an order shall be entered establishing the forfeiture as the amount set forth in the Notice of Apparent Liability."

APPENDIX

You attached the following list of the times that the above commercial announcements were broadcast:

July 7, 1972—8:35 A.M., 5:20 P.M.
July 8, 1972—9:15 A.M., 12:35 P.M.
July 9, 1972—12:45 P.M., 3:40 P.M.
July 10, 1972—12:20 P.M., 5:20 P.M.
July 11, 1972—10:50 A.M., 4:20 P.M.
July 12, 1972—12:40 P.M., 3:50 P.M.
July 13, 1972—12:50 P.M., 3:50 P.M.
July 14, 1972—8:35 A.M., 5:20 P.M.
July 15, 1972—9:20 A.M., 12:35 P.M.
July 16, 1972—12:40 P.M., 2:35 P.M.
July 17, 1972—12:20 P.M., 5:20 P.M.
July 18, 1972—10:50 A.M., 4:20 P.M.
July 24, 1972—1:25 P.M., 3:45 P.M.,
July 24, 1972—5:25 P.M., 7:50 P.M.
July 25, 1972—7:40 A.M., 10:45 A.M.,
July 25, 1972—12:40 P.M., 4:25 P.M.
July 26, 1972—8:20 A.M., 10:25 A.M.,
July 26, 1972—1:40 P.M., 3:40 P.M.
July 27, 1972—8:15 A.M., 9:40 A.M.
July 28, 1972—8:45 A.M., 10:20 A.M.,
July 28, 1972—1:35 P.M., 3:50 P.M.
July 29, 1972—8:50 A.M., 2:10 P.M.
July 30, 1972—1:20 P.M., 4:10 P.M.
July 31, 1972—8:20 A.M., 2:35 P.M.
August 1, 1972—10:20 A.M., 4:25 P.M.
August 2, 1972—8:20 A.M., 1:35 P.M.
August 3, 1972—9:45 A.M., 1:50 P.M.
August 4, 1972—8:40 A.M., 1:35 P.M.
August 5, 1972—8:50 A.M., 2:20 P.M.
August 6, 1972—1:15 P.M., 4:10 P.M.
August 7, 1972—8:25 A.M., 2:35 P.M.
August 8, 1972—10:50 A.M., 4:25 P.M.
August 9, 1972—8:35 A.M., 1:40 P.M.
August 10, 1972—9:45 A.M., 1:55 P.M.
August 11, 1972—8:45 A.M., 1:35 P.M.
August 12, 1972—8:50 A.M., 2:15 P.M.
August 13, 1972—1:15 P.M., 4:10 P.M.
August 14, 1972—8:20 A.M., 2:40 P.M.
August 15, 1972—10:50 A.M., 4:25 P.M.

FCC 74-525

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re REQUESTS FOR ISSUANCE OF TAX CERTIFICATES FOR THE SALE OF OWNERSHIP INTERESTS IN INDIANA CABLE TV, INC., BY: ANTON HULMAN, Jr. JOSEPH R. CLOUTIER	CTAX-21 CTAX-22

MEMORANDUM OPINION AND ORDER

(Adopted May 22, 1974; Released May 31, 1974)

BY THE COMMISSION: COMMISSIONER QUELLO NOT PARTICIPATING.

1. On April 29, 1974, Anton Hulman, Jr., and Joseph R. Cloutier petitioned the Commission to issue tax certificates pursuant to Section 1071 of the Internal Revenue Code of 1954 [1] with respect to the already consummated sale of their ownership interests in Indiana Cable TV, Inc., operator of a cable television system at Terre Haute, Indiana. They filed a supplemental pleading on May 6, 1974. Both Petitioners held this property in their own names, but Mr. Hulman held his interest for the benefit of the Grace Hulman Decedent's Trust, of which he is the sole trustee. Prior to this sale, across-relationship existed which violated Section 76.501 of the Commission's Rules [2] because Messrs. Hulman and Cloutier are officers and stockholders with more than a one percent interest of Wabash Valley Broadcasting Corporation, licensee of Station WTHI-TV, Terre Haute, Indiana, which

[1] Section 1071 of the Internal Revenue Code of 1954 provides: "If the sale or exchange of property (including stock in a corporation) is certified by the Federal Communications Commission to be necessary or appropriate to effectuate a change in policy of, or the adoption of a new policy by, the Commission with respect to the ownership or control of radio broadcast stations, such sale or exchange shall, if the taxpayer so elects, be treated as an involuntary conversion of such property within the meaning of Section 1033 . . . ." The term "radio broadcast stations" refers not only to AM, FM, and television broadcast stations, but also to cable television systems and television broadcast networks, both of which provide a mass communications service ancillary to broadcasting and hence are subject to Commission regulation. *J.A.W. Inglehart*, 38 FCC 2d 541, 542 (1972); *Cosmos Cablevision Corp.*, 33 FCC 2d 293, 295 (1972).

[2] Section 76.501 of the Commission's Rules provides in relevant part:

(a) No cable television system (including all parties under common control) shall carry the signal of any television broadcast station if such system directly or indirectly owns, operates, controls, or has an interest in:

(1) A national television network (such as ABC, CBS, or NBC); or

(2) A television broadcast station whose predicted Grade B contour computed in accordance with § 73.684 of this chapter, overlaps in whole or in part the service area of such system (i.e., the area within which the system is serving subscribers); or

(3) A television translator station licensed to the community of such system.

NOTE 1: The word "control" as used herein is not limited to majority stock ownership, but includes actual working control in whatever manner exercised.

NOTE 2: The word "interest" as used herein includes, in the case of corporations, common officers or directors and partial (as well as total) ownership interests represented by ownership of voting stock.

NOTE 3: In applying the provisions of paragraphs (a) of this section to the stockholders of a corporation which has more than 50 stockholders:

(a) Only those stockholders need be considered who are officers or directors or who directly or indirectly own one percent or more of the outstanding voting stock.

places better than a predicted Grade B contour over the cable television system in which they held stock.

2. Each Petitioner acquired a 23 percent interest in Indiana Cable TV, Inc., in 1966, prior to the adoption of Section 76.501 of the Commission's Rules; and on November 9, 1973, each sold his entire interest in Indiana Cable TV, Inc., to American Television & Communications, Inc. Petitioners state that they received only cash from American Television and that they have no interest, direct or indirect, in American Television.

In view of the foregoing, we find that Petitioners' sale of their respective 23 percent interests in Indiana Cable TV, Inc. was "necessary or appropriate to effectuate a change in policy or the adoption of a new policy" by the Commission.

Accordingly, IT IS ORDERED, That the petitions for tax certificates (CTAX 21-22) filed by Anton Hulman, Jr., and Joseph R. Cloutier on April 29, 1974, ARE GRANTED, and that the tax certificates appended hereto will BE ISSUED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

CERTIFICATE ISSUED BY THE FEDERAL COMMUNICATIONS COMMISSION PURSUANT TO SECTION 1071 OF THE 1954 INTERNAL REVENUE CODE (26 U.S.C. 1071)

Joseph R. Cloutier has reported to the Commission the sale on November 9, 1973, of his 23 percent interest in Indiana Cable TV, Inc., to American Television & Communications, Inc.

It is hereby certified that the transfer was necessary or appropriate to effectuate the Commission's new rules and policies prohibiting the cross-ownership, operation, control, or interest of a cable television system with a television broadcast station whose predicted Grade B contour overlaps in whole or in part the service area of such system. Section 76.501 of the Commission's Rules, adopted June 24, 1970, *Second Report and Order in Docket 18397*, 23 FCC 2d 816.

This certificate is issued pursuant to the provisions of Section 1071 of the 1954 Internal Revenue Code.

In witness whereof, I have hereunto set my hand and seal this — day of May, 1974.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

CERTIFICATE ISSUED BY THE FEDERAL COMMUNICATIONS COMMISSION PURSUANT TO SECTION 1071 OF THE 1954 INTERNAL REVENUE CODE (26 U.S.C. 1071)

Anton Hulman, Jr., as trustee for the Grace Hulman Decedent's Trust, has reported to the Commission the sale, on November 9, 1973, of his 23 percent interest in Indiana Cable TV, Inc., to American Television & Communications, Inc.

It is hereby certified that the transfer was necessary or appropriate to effectuate the Commission's new rules and policies prohibiting the

cross-ownership, operation, control, or interest of a cable television system with a television broadcast station whose predicted Grade B contour overlaps in whole or in part the service area of such system. Section 76.501 of the Commission's Rules, adopted June 24, 1970, *Second Report and Order in Docket 18397*, 23 FCC 2d 816.

This certificate is issued pursuant to the provisions of Section 1071 of the 1954 Internal Revenue Code.

In witness whereof, I have hereunto set my hand and seal this — day of May, 1974.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-565

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of INTERNATIONAL RECORD CARRIERS' SCOPE OF OPERATIONS IN THE CONTINENTAL UNITED STATES, INCLUDING POSSIBLE REVISIONS TO THE FORMULA PRESCRIBED UNDER SECTION 222 OF THE COMMUNICATIONS ACT	Docket No. 19660 RM-690

MEMORANDUM OPINION AND ORDER

(Adopted May 30, 1974; Released June 10, 1974)

BY THE COMMISSION: COMMISSIONER QUELLO NOT PARTICIPATING.

1. By Memorandum Opinion and Order (Order) in the above-captioned matter released November 26, 1973, 43 F.C.C. 2d 1174, we instituted an investigation to determine whether the distribution by The Western Union Telegraph Co. (WU) to the international record carriers (IRC's) of outbound international message telegraph traffic under the formula prescribed pursuant to Section 222(e)(1) of the Communications Act is unjust, unreasonable, or inequitable or not in the public interest and whether the Commission should prescribe any amendments to such formula. The Commission has before it for consideration letters, all dated March 11, 1974, from RCA Global Communications, Inc. (RCA), Western Union International, Inc. (WUI), TRT Telecommunications Corp. (TRT), and ITT World Communications Inc. (ITT) which seeks an interpretation of our November 26 Order. RCA replied to the ITT letter on March 27, 1974.

2. In the above Order, we designated for investigation the following issues:

(1) The exact manner in which the distribution of traffic is presently being made, broken down by carrier, category of traffic, and areas and sub-areas.

(2) The nature, extent and reason for the existing overages and deficiencies in assigned quotas. In this connection, each carrier shall present full data with respect to its overages or deficiencies, by area and sub-area, as of each year-end for the ten (10) years ending December 31, 1972, and an estimate for the year ending December 31, 1973; as well as the totals, by area and sub-area, since distribution began under the formula.

(3) The present defects in the formula, pointing out with specificity the effect of each defect, not only on the respondent, but also on other international record carriers and on the quality of service provided to and rates charged the using public.

(4) The specific amendments which should be made to the formula to remove each such defect, the effect each such amend-

ment will have on respondent, other international record carriers, and on the quality of service provided to and the rates charged the using public.

We also directed the parties to file with us, within 60 days of the release of the Order, statements of fact and memorandums of law relative to the designated issues, which would set forth their respective positions on the defects in the formula, if any, the need for amendment, and any recommended changes.

3. The present request arises from a series of meetings between the IRC's, WU, and the staff which were convened at RCA's request to discuss RCA's contention that certain statistical data called for by the issues were unavailable.[1] After discussion, the parties appear to have agreed upon a plan whereby WU would collect the desired data and the participating IRC's would bear equitably the costs of the study. Some parties, most notably ITT, object to the delay in filing carrier comments which the proposed study will entail. By letter of April 11, 1974, WU stated that it can develop the computer program needed for the study in about two months and will be prepared to begin collecting data on July 1. ITT stated that while the data in question would be helpful, it did not believe they were necessary to respond to the issues and that the delay would therefore be unjustified.

4. Both RCA and WUI urge the necessity of the proposed study before the parties can respond to the issues. They argue that the issues require a statistical analysis of the manner in which international message traffic is presently distributed under the formula, broken down by carrier, area, and sub-area. The carriers say they lack the data to make these analyses because the data supplied by the International Quota Bureau (IQB)[2] are incomplete, in that they do not include any figures for messages transferred by WU to an IRC who is entitled under the formula to all unrouted traffic to a particular point. Further, they contend that the IQB data which do exist are distorted and thus unreliable. In support of this contention, RCA cites WU's practice of treating messages filed with a WU central telephone bureau as hinterland traffic even though the originating customer is located in a gateway city. Also, WU does not differentiate between routed and unrouted messages filed in those WU public offices which, under the formula, constitute WUI public offices. Finally, RCA notes that there is a discrepancy between the IQB figures and the totals the IRC's report in the annual reports filed under Section 43.61 of the Commission's Rules. The proposed study is necessary, they say, to provide accurate data from which to determine the effects on a given carrier of proposed changes in the formula. They contend that because of the hearing requirement in Section 222(e)(3)

[1] ITT, RCA, WUI, and TRT were the IRC's who participated, while the others, who had no objection to the meetings, chose not to participate.

[2] The IQB is the operating arm of the International Formula Committee (IFC) and oversees the administration of the Formula. The IFC is a body composed of representatives of the IRC's entitled to quotas under the formula and was given the responsibility for administering the formula (subject to review by the Commission). The IFC, including the IQB, was made a party to this proceeding for the purpose of providing data within its files. Copies of the information supplied to the IRC's have been filed with the Commission and are part of the record in this proceeding.

of the Act, the Commission cannot lawfully change the formula without information on such effects.[3]

5. ITT and TRT, on the other hand, take the position that the data which would result from the proposed study are unnecessary to respond to the issues and therefore object to the substantial delay which would be occasioned thereby. ITT contends that the issues do not require statistical analyses and that a qualitative approach would equally be appropriate. ITT does not contend that the Commission should ignore the quantitative effect of proposed amendments, but that such a determination is not a pre-requisite to carrier responses. If the Commission wants the data on quantitative effects for its own consideration of the formula question, ITT believes it should direct the parties to conduct the study but it contends that the Commission, rather than the parties, should perform the analysis. The study could thus be conducted parallel in time with the preparation of the carrier responses and substantial delay would be avoided.

DISCUSSION

6. The dispute considered herein arises from language in the designated issues which requires the parties to include certain statistical information with their comments. In framing the issues, we had assumed that an ample data base was readily available and that there would, therefore, be no problem in providing the requested information. Apparently, we were in error.

7. Our purpose was to elicit specific details of present and past distribution of traffic under the existing formula, or anticipated distribution under a revised formula, to assist us in a quantitative, as distinguished from a qualitative, evaluation of the present formula and of any proposed revisions. While it may be that such quantitative evaluation is not essential under Section 222(e)(3), it could be helpful, at least, to our understanding of the degree to which problems existed in the present formula, and the extent to which any revisions would result in a redistribution of traffic.

8. We think, however, that the proceeding can move ahead at this time on the basic qualitative questions, without prejudice to any respondent, and that the proposed WU study can proceed concurrently. As we stated in our November 26 Order, the gravaman of the ITT petition is that the quota system basic to the formula has been overtaken by events since 1943, so that present institutional and policy considerations require that the formula be revised. The others interested in the matter have previously commented in a vein which did not rest on precise quantitative analysis. We think that it would be most efficient for the parties now to address the issues using such statistical documentation as may be available from the IQB data as well as such additional data they may have in their possession.

[3] WU also filed a letter, but it did not advance an adversary position since the overall formula question does not directly affect any WU interest. Rather, the stated purpose of this letter was to comment on two factual assertions in the RCA letter. First, WU does not agree to change its procedures to give IRC's the data they requested. Second, WU disagrees with RCA's statement that it had said the study would take "at least three months."

In the meantime, we believe that WU should proceed promptly with the study and present the results at the earliest possible time.[4]

9. We shall therefore require the parties to file, within three weeks of the release of this order, the statements and memorandums of law called for in our prior Order. Since the parties have been on notice of this inquiry for some time, this should allow sufficient time for preparation of the comments. We shall also order the parties, in view of the progress made in defining a statistical sampling procedure to supply data to complete that already available, to proceed immediately with the proposed statistical study, and to submit it to us promptly upon its completion. We shall thereupon make provision for the parties to file any necessary further comments, both on the study and to supplement the comments filed in accordance with this Order.

10. Accordingly, IT IS ORDERED, that the statements of fact and memorandums of law with respect to the issues designated in the above-captioned proceeding shall be filed with the Commission by all parties respondent within three (3) weeks of the release of this Order.

11. IT IS FURTHER ORDERED, that the parties filing the initial statements may file responsive comments within thirty (30) days after the statements are due and replies to such responses may be filed within fifteen (15) days thereafter;

12. IT IS FURTHER ORDERED, that The Western Union Telegraph Company shall conduct a study of outbound international message traffic, covering three consecutive one-week periods, according to the plan agreed upon by the parties at the meetings referred to herein and shall file such study with the Commission and the parties upon its completion;

13. IT IS FURTHER ORDERED, that ITT World Communications Inc., RCA Global Communications, Inc., Western Union International, Inc. and TRT Telecommunications Corp. shall bear the costs of the above study according to agreement between the carriers; and

14. IT IS FURTHER ORDERED, that upon filing of the completed study, we will take such further action and issue such further orders as will then appear appropriate.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[4] The position of RCA and WUI, if followed to its logical conclusion would preclude any revision of the formula from ever taking place if detailed data on past distribution were not available. Under Section XI of the Formula, the IQB is the responsibility of the several carriers participating in the Formula and, in view of the long pendency of the ITT petition, it appears that there was ample time for such carriers to have required that such data, now considered essential, be collected.

FCC 74-557

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of KAISER BROADCASTING CO., SAN FRANCISCO, CALIF. For Changes in Facilities of KBHK-TV	File No. BPCT-4688

MEMORANDUM OPINION AND ORDER

(Adopted May 29, 1974; Released June 5, 1974)

BY THE COMMISSION: COMMISSIONER HOOKS CONCURRING IN THE RESULT.

1. The Commission has before it for consideration the application (BPCT-4688) of Kaiser Broadcasting Company ("Kaiser") to install an auxiliary antenna for station KBHK-TV, channel 44, San Francisco, California, at its main transmitter-antenna location at Mt. Sutro in San Francisco. The Commission also has before it a "Petition to Deny," by the Community Coalition for Media Change ("CCMC"), filed January 2, 1974; an "Opposition" by Kaiser, filed January 14, 1974; and a "response" by CCMC, filed January 28, 1974.

2. We first note that a "Petition to Deny" does not properly lie against an application of this sort. Under section 1.580(a) and (i) of our rules, only applications for changes in facilities described as "major" by section 1.572(a)(1) are subject to petitions to deny. The auxiliary antenna, if authorized, will not be a "major change" as defined by section 1.572(a)(1), because it will not result in a fifty percent or greater change in the area with the station's predicted Grade B contour. We will, however, consider CCMC's petition an "informal objection" under section 1.587 of the rules, and treat the matters raised therein on the merits.

3. CCMC's complaint centers around KBHK-TV's asserted lack of an adequate program of equal employment opportunity for minority group members, especially Blacks. CCMC alleges that KBHK-TV has no program for training minority group members, or upgrading minority employees from their present positions; that there are no Black employees at the management level of KBHK-TV; and that Black employees are generally confined to the "traffic department," which CCMC says is the least desirable department in the station's operation. Specifically, CCMC claims that KBHK-TV made no effort to upgrade the status of a Black employee of more than three years in the traffic department, and that KBHK-TV has not notified the "Broadcast Skills Bank," an organization for the referral of minority applicants for broadcast positions in the San Francisco Bay area, of a vacancy in the position of station manager of KBHK-TV. In its

104-041—74——6

Response to Kaiser's Opposition, CCMC also raised the matter of a former Black female employee in the management level of KBHK–TV, whom it claimed was "forced" to leave. The allegation, however, was framed in entirely conclusory terms, without any suggestion of the circumstances surrounding her departure.[1] It would appear from the Kaiser pleading that the woman took a position with a VHF station in San Francisco.

4. CCMC alleges that KBHK–TV has "no training programs and no employee upgrading programs." The KBHK–TV Equal Employment Opportunity Program on file with the Commission and maintained as part of the station's public file, states:

> (e) Whenever a position opens up, inquiry is made of women and minority group persons employed by the station in lower paying jobs as to their interests in the position and relevant skills. Employees with the interests and potential to qualify for the position are assisted to qualify for the position by counseling and certain on the job training.

While such diametrically opposed statements do not contribute to a resolution of the issue, evidence is available which leads us to conclude that the matter should be resolved in favor of KBHK–TV. In its Opposition, Kaiser relates that the Black male employee, who CCMC claims spent three years in the traffic department without upgrading, was successively promoted from office services clerk (grade 2) to control clerk (grade 3), to sales-service coordinator (grade 4), to sales trainee (grade 6), to account executive, with income potential from commissions on sales of $18,000–$32,000 per year. Kaiser further relates than an oriental female employee began work as an accounting clerk and has risen to the post of traffic supervisor, which Kaiser classifies as a management position, and that a Black female employee hired as a receptionist (grade 2) has advanced to traffic assistant (grade 4). CCMC has not disputed these recitations, except to say that the Black male employee referred to above was promoted to account executive only after the filing of its petition. While that may be chronologically correct, it would appear that his advancement was well under way before the petition was filed.

5. CCMC also alleges that "Kaiser/KBHK has twelve official and managerial positions and there are no Black persons employed in any of these twelve positions, even though Black people make up approximately 20 percent of the San Francisco population." Kaiser responds that it has ten officials and managers, and that one of these positions is held by a minority group member, not, however, Black. According to the 1970 census, Blacks constitute 13.4 percent of the population of the City and County of San Francisco, and somewhat less in the Bay area as a whole. Reliable estimates indicate that Spanish-surnamed and other non-white Americans (particularly Orientals) are both as numerous as Blacks, if not more so. Thus, KBHK–TV's equal employment opportunity program should not be judged on its record of Black employment, but on its accomplishments for all minority groups in the community. Kaiser says minority group members account for 24 percent of its employees, filling 23 percent of the full-time positions. According to Kaiser, Blacks account for

[1] Nor was the allegation supported by the affidavit of a person or persons with personal knowledge of the facts, as required by section 1.580(i) of the rules.

12 percent of the entire work force, and 10 percent of the full-time employees. In our Report and Order in Docket No. 18244, *Nondiscrimination in Employment Practices of Broadcast Licensees*, 18 FCC 2d 240 (1969), we stated that:

> Therefore, while not every complaint of an isolated action, even if substantial, will warrant deferring a renewal or designating a renewal application for hearing, renewal will not be appropriate where there is a pattern of substantial failure to accord equal employment opportunities. *Id.* at pp. 241–242. (Footnote omitted.)

We believe the same standard for judging a renewal application should be applied to an application for changes in the facilities of a station. But this is not a case of a "pattern of substantial failure to accord equal employment opportunities." In fact, it is a better reflection of the composition of the community of license than other cases where a license has been renewed without a hearing. See *Evening Star Broadcasting Co.*, 27 F.C.C. 29 316, 334 (1971), aff'd *sub nom. Stone* v. *FCC*, 466 F. 2d 316 D.C. Cir. (1972). In this connection, we stated in *Scripps-Howard Broadcasting Company*, 31 FCC 2d 1090, at 1103 (1971):

> The Commission does not require its licensees to employ numbers of minority groups in direct proportion to such groups' percentage of population in the community. In other words, the Commission does not require broadcasters to serve a quota system in their employment practices. The Commission does require that licensees make every reasonable effort to eliminate racial considerations from influencing hiring and promotional practices.

KBHK–TV's percentage of minority employees falls well within a "range of reasonableness" when considered in conjunction with the number of minorities in the San Francisco area. *Avco Broadcasting Corp.*, 39 FCC 2d 419 (1972).

6. KBHK–TV would also appear to have refuted CCMC's charge that Blacks are confined to positions in the traffic department. In its Opposition, Kaiser notes that:

> Two minority group members (one of whom is Black), for example, serve as technicians, while two other Blacks are professionals, and a third minority group member will soon begin work as a producer-director. Other minority group members are sales workers. . . .

Kaiser further states that the average grade level in the traffic department is higher than in other departments such as production and programming.

7. With respect to CCMC's complaint that KBHK–TV has not notified the Broadcast Skills Bank of the vacancy in the station manager's position, it appears that KBHK–TV does not have a station manager, but does have a general manager and an operations manager. Kaiser says the general manager's position is vacant and has not been filled. It is not clear whether KBHK–TV has attempted to fill the job. The operations manager position, Kaiser says, was created in September 1973, as a "special position" for an especially qualified individual whom the company wished to hire. Kaiser has described other minority resource groups which it consults in connection with hiring and we cannot say that failure to consult the Broadcast Skills Bank is *prima facie* discriminatory. While CCMC in its Response for the first time raised the allegation that KBHK–TV had "in many

cases . . . called the Skills Bank after having interviewed applicants and having made a choice" (emphasis in the original)[2], it has not alleged any specific acts of discrimination on the part of KBHK–TV.

8. Accordingly, after a review of the instant application and all the pleadings filed in this case, we find that CCMC has failed to make a showing that grant of the application would be *prima facie* inconsistent with the public interest. On the other hand, we find that installation of a standby antenna for KBHK–TV, as described in the application, would serve the public interest, convenience, and necessity.

Therefore, IT IS ORDERED, That the objections of Community Coalition for Media Change ARE DENIED, and the application (file No. BPCT–4688) of Kaiser Broadcasting Company IS GRANTED, in accordance with the attached specifications.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[2] This allegation has not been supported by the affidavit of a person or persons with personal knowledge of the facts, as required by section 1.580(i) of the rules.

FCC 74-578

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 81 OF THE RULES TO REQUIRE CLASS II-B LIMITED COAST STATIONS TO BE EQUIPPED FOR THE DISTRESS, SAFETY, AND CALLING FREQUENCY 2182 KHZ	Docket No. 20072

NOTICE OF PROPOSED RULEMAKING

(Adopted June 5, 1974; Released June 7, 1974)

BY THE COMMISSION: COMMISSIONER QUELLO NOT PARTICIPATING.

1. Notice of Proposed Rule Making is hereby given in the above-entitled matter.

2. It has come to the Commission's attention that some radiotelephony limited coast stations have been using their assigned working frequencies for the purpose of calling vessels for routine radiocommunications purposes. Consequently, many vessels, and especially those that may be equipped with only one radio receiver, may be adopting the practice of keeping their radio stations tuned most or all of the time to a working frequency of the coast station with which they frequently exchange communications, and not the distress, safety and calling frequency 2182 kHz.

3. The practice of keeping a ship radio station tuned only to a working frequency when not in use for communications is a violation of Section 83.223 of the rules that requires a listening watch on the frequency 2182 kHz be maintained. The practice undermines the maritime mobile safety system. Distress calls could be transmitted by nearby vessels and not heard by the vessel whose radio station is tuned to a working frequency or frequencies.

4. To discourage the above-described practice and to enhance and improve the safety system, we propose to provide in our rules that limited coast telephony stations operating on low or medium frequencies must be equipped for the calling frequency 2182 kHz and that calling must ordinarily be done on that frequency. VHF limited coast stations are currently required to be equipped with the calling frequency 156.8 MHz and to ordinarily call on that frequency. In addition to the above described substantive rule change, we are editorially rewriting Section 81.104 of our rules to delete certain obsolete footnotes therefrom, and to relocate other footnotes which, because of the passage of time, should now be located in the body of the rule section.

5. The proposed amendment to the rules, as set forth in the Appendix, is issued pursuant to authority contained in Sections 4(i) and 303 (r) of the Communications Act of 1934, as amended.

6. Pursuant to applicable procedures set forth in Section 1.415 of the Commission's rules, interested persons may file comments on or before July 18, 1974, and reply comments on or before July 29, 1974. All relevant and timely comments and reply comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision in this proceeding, the Commission may also take into account other relevant information before it, in addition to the specified comments invited by this Notice.

7. In accordance with the provisions of Section 1.419 of the Commission's rules, an original and 14 copies of all statements, briefs, or comments filed shall be furnished the Commission.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

Part 81 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

1. Section 81.104, paragraphs (b) and (c) are amended, and new paragraphs (d) and (e) are added as follows:

§ 81.104 Facilities required at coast stations.

(a) * * *

(b) Each coast station using telephony on frequencies in the band 1600–3500 kHz shall be equipped and licensed to transmit on the frequency 2182 kHz and at least one working frequency [1] in that band.

(c) With regard to public coast stations:

(1) Apparatus to comply with paragraph (b) of this Section shall include transmitting and/or receiving equipment installed at each location where transmitting and/or receiving equipment, respectively, is installed and regularly used by the particular station to provide service on one or more working frequencies within the band 1600 to 3500 kHz.

(2) Compliance with subparagraph (1) of this paragraph shall be a condition precedent to obtaining a new or renewed station license unless the applicant therefor makes a showing satisfactory to the Commission that, for purposes of maritime safety, all or any portion of such apparatus for operation on the 2182 kHz channel is not necessary for effective transmission and reception to and from mobile stations within the associated working frequency service area of the coast station.

(3) The transmitter power on the frequency 2182 kHz must be 50 watts or the maximum power used on any other frequency in the band, whichever is less.

(d) Each coast station licensed to transmit on frequencies in the band 1600–3500 kHz shall be capable of receiving A3 [2] and A3H emission on the frequency 2182 kHz and of receiving A3 [2] and A3H [3] emission on at least one working frequency in that band.

(e) Each coast station licensed to transmit in the band 156–162 MHz shall be able to transmit and receive on 156.8 MHz and at least one working frequency in the band.

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[1] In public coast stations, capability to transmit A3H emission on working frequencies shall be provided until January 1, 1977.

[2] Capability to receive A3 emission shall be provided until January 1, 1977. This requirement may be fulfilled by provision of the capability to receive emission A3H.

[3] Capability to receive A3H emission on the working frequencies shall be provided until January 1, 1977. After January 1, 1977, capability to receive A3A and A3J emissions shall be provided.

2. In Section 81.368(a), subparagraph (2) is amended to read as follows:

§ 81.368 General radiotelephone operating procedure.

(a) * * *

(2) Limited coast stations shall call ship stations by voice unless it is known that the attention of a particular ship station with which communication is intended may be secured by other means (such as automatic actuation of a selective ringing device). Calling shall be on the frequencies 2182 kHz or 156.8 MHz, depending on which band the coast station is operating, except that calling may be on a working frequency if it is known that the ship station being called is equipped with two receivers in the appropriate band and is maintaining a listening watch on a working frequency as well as the frequency 2182 kHz or 156.8 MHz.

* * * * * * *

FCC 74-544

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
AMENDMENT OF SECTION 0.121(c) OF THE COMMISSION'S RULES TO DELETE LISTINGS OF MONITORING STATIONS AT SANTA ANA, CALIF., AND SPOKANE, WASH.

ORDER

(Adopted May 29, 1974; Released June 3, 1974)

BY THE COMMISSION:

1. As of July 1, 1974, the Commission will close its monitoring facilities located at Santa Ana, California, and Spokane, Washington. Accordingly, IT IS ORDERED, That, § 0.121(c) of the Rules IS AMENDED by deleting therefrom the references to Federal Communications Commission monitoring station locations at Post Office Box 5126, Santa Ana, California, 92704 and Post Office Box 191, Spokane, Washington, 99210, effective July 1, 1974.

2. As these amendments relate to internal Agency organization, prior notice, procedural and effective date provisions of the Administrative Procedure Act (5 U.S.C. 553) do not apply. Authority for these amendments is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-566

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of MUSKEGON CABLE TV CO., NORTON SHORES, MICH. For Certificate of Compliance	CAC-2853 MI193

MEMORANDUM OPINION AND ORDER

(Adopted May 30, 1974; Released June 5, 1974)

BY THE COMMISSION: COMMISSIONER REID CONCURRING IN THE RESULT; COMMISSIONER QUELLO NOT PARTICIPATING.

1. On July 27, 1973, Muskegon Cable TV Company filed the above-captioned application for a certificate of compliance to commence operation of a cable television system at Norton Shores, Michigan. Norton Shores, a community of approximately 23,000 persons, is located within the Kalamazoo-Grand Rapids-Muskegon-Battle Creek, Michigan, major television market (#37). Muskegon Cable proposes carriage of the following signals:

WOTV (NBC, Channel 8), Grand Rapids, Michigan
WZZM-TV (ABC, Channel 13), Grand Rapids, Michigan
WGVC (Educ., Channel 35), Grand Rapids, Michigan
WKZO-TV (CBS, Channel 3), Kalamazoo, Michigan
WUHQ-TV (ABC, Channel 41), Battle Creek, Michigan
WKBD-TV (Ind., Channel 50), Detroit, Michigan
WMVS (Educ., Channel 10), Milwaukee, Wisconsin
WGN-TV (Ind., Channel 9), Chicago, Illinois
WSNS-TV (Ind., Channel 44), Chicago, Illinois

Muskegon Cable's proposed signal carriage is fully consistent with the provisions of Section 76.61 of the Commission's Rules. The franchise and access proposals submitted in conjunction with this application are fully consistent with the provisions of Section 76.31 and 76.251 of the Rules.

2. On September 6, 1973, an objection to this application was filed by West Michigan Telecasters, Inc., licensee of Station WZZM-TV, Grand Rapids, Michigan. West Michigan argues that Muskegon Cable's application is deficient in three respects: (a) that it fails to contain an assurance that the applicant will comply with the Commission's network and syndicated program exclusivity rules (Sections 76.91 and 76.151); (b) that it fails to contain an assurance that the signals will be carried without material degradation in quality and in accordance with the technical standards of Subpart K of the Rules (Section 76.55); and (c) that it proposes carriage of Station WZZM-TV on cable channel 2, which is not its regular over-the-air channel. In its reply, Muskegon states that it will afford Station WZZM-TV all

network and non-network exclusivity to which it is entitled under applicable Commission Rules. Muskegon also argues that carriage of Station WZZM–TV on a different channel is justified on the basis of avoiding signal interference due to the close proximity of WZZM–TV's transmitter to the cable system.

3. Muskegon Cable agrees to carriage of WZZM–TV on channel 13, if West Michigan insists. West Michigan's remaining objections must be rejected, because the Commission's rules do not require that applications for certificates of compliance contain the assurances specified by West Michigan. *See Johnson All Channels, Inc.*, FCC 72–1008, 38 FCC 2d 61 (1972). However, we expect Muskegon to comply with all of the Rules, and we note that Muskegon has agreed to comply fully with all applicable network and non-network exclusivity provisions.

4. Noting that the Commission continues to receive "objections" to applications on the ground that no express assurances of compliance with one or more of our cable rules are given, we take this opportunity to reiterate that this is not a viable type of objection. We expect cable operators to comply with all applicable Commission rules, without having to give special assurances. Henceforth, any such comments or "objections" will be given no weight or will be dismissed.

In view of the foregoing, we find that a grant of the subject application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Objections of West Michigan Telecasters, Inc.", filed against the above-captioned application, ARE DENIED.

IT IS FURTHER ORDERED, That the application for certificate of compliance (CAC–2853), filed by Muskegon Cable TV Company, IS GRANTED, and an appropriate certificate of compliance be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74–570

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of NORTH AMERICAN COMMUNICATIONS CORP. (KBG–95), BAKER, MINN. For Construction Permit To Increase Power and To Relocate Intercity Relay Station	File No. BPTI–1759
NORTH AMERICAN COMMUNICATIONS CORP., BAKER, MINN. For License To Cover Permit	File No. BLTI–1636
NORTH AMERICAN COMMUNICATIONS CORP. For Modification of Licenses	Files Nos. BMLTI–406 through 413

MEMORANDUM OPINION AND ORDER

(Adopted May 30, 1974; Released June 4, 1974)

BY THE COMMISSION:

1. On April 3, 1974, the Chief, Broadcast Bureau, acting pursuant to delegated authority, granted the application (BPTI–1759) of North American Communications Corporation (NACC), licensee of KXJB–TV, channel 4, Valley City, North Dakota, for a construction permit to increase the power of intercity relay station KBG–95 and relocate the station from Sabin, Minnesota, to Baker, Minnesota, and an application (BLTI–1636) for a license to cover the changes (Public Notice released April 8, 1974). In so doing, the Chief, Broadcast Bureau dismissed objections filed by Spokane Television, Inc., licensee of KTHI–TV, channel 11, Fargo, North Dakota (hereafter referred to as "KTHI"). KTHI has, on May 2, 1974, filed a Petition for Stay of the Bureau's action granting the above applications, as well as other applications of NACC for changes in the facilities of its other stations along its intercity relay system (file Nos. BMLTI–406 through 413), and simultaneously, an Application for Review of the Bureau's decision.[1] Both the Petition and the Application for Review are opposed by NACC in pleadings filed May 14, 1974.

2. As set forth in *Capitol Broadcasting Co., Inc.*, 1 FCC 2d 376–377 (1965), "The standard applied to requests for stay is twofold: that the petitioner show that failure to grant a stay would lead to an irreparable injury to the public (or its own interest), and that the petitioner demonstrate a likelihood of success on the merits of its petition for reconsideration." In the case before us, KTHI is the licensee of its own intercity relay system, running parallel to that of NACC, using equipment which it leases from NACC's affiliated company, Minnesota Tele-

[1] The Commission does not deal with the Application for Review in this decision.

vision System, Inc. (MTSI). Only the equipment used to supply programming to NACC's station, KXJB–TV, is affected by these applications. KTHI presents two reasons why it believes it will suffer irreparable injury: (1) because NACC's new equipment will require less maintenance, NACC/MTSI will cease to perform maintenance on KTHI's channel of the intercity relay system, and (2) failure to stay the Bureau's Order will "deprive Station KTHI–TV of any opportunity to present its case to the Commission or to the Courts."

3. KTHI's speculation about NACC/MTSI's intentions does not amount to a showing that irreparable injury will inevitably result from a failure to grant a stay of the Bureau's action. Nor will KTHI be deprived of its right to a review of the Bureau's decision. The Commission can adequately treat all of KTHI's allegations concerning NACC's conduct when it considers KTHI's Application for Review in a subsequent decision and, particularly as the allegations concern NACC/MTSI's maintenance of KTHI's system rather than the system which is the subject of these applications, fashion an appropriate order if relief is warranted.

4. KTHI also fails to establish the likelihood of success on its Application for Review. Its statement that "it is inconceivable that the Commission or the Courts could possibly uphold the action of the Chief [of the] Broadcast Bureau," is strictly argumentative and without substance and KTHI has cited no rule or precedent of the Commission in support of that claim. Accordingly, the Commission does not believe that the petitioner had made an adequate showing to justify the requested stay.

Therefore, IT IS ORDERED, That the Spokane Television, Inc., Petition for Stay IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-585

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of N-TRIPLE-C, INC. For Consent To Transfer of Control of Licenses and Construction Permits in the Point-to-Point Microwave Radio Service to MCI Communications Corp.	File No. 4240-C1-TC-(128)-74

MEMORANDUM OPINION AND ORDER

(Adopted June 5, 1974; Released June 6, 1974)

BY THE COMMISSION: COMMISSIONER REID DISSENTING; COMMISSIONER QUELLO NOT PARTICIPATING.

1. The Commission has before it the above-captioned application of MCI Communications Corporation (MCI), filed on May 14, 1974, proposing a transfer of control of N-Triple-C to MCI. Also associated with this application is an application for consent to assignment of NCCC to MCI Mid-Continent, File No. 3562-C1-AP/AL-(128)-74, filed on March 20, 1974.[1] An informal opposition was filed by Mountain Microwave Corporation (MMC) to the assignment application.

2. NCCC is the permittee or licensee of 128 point-to-point microwave radio authorizations. Its currently operating route (which provides the same type specialized communications as MCI) extends approximately from Minneapolis and Chicago through Omaha and various other cities to a southern terminal in San Antonio. It has also been authorized facilities west to Scottsbluff, Nebraska and southeast to Memphis and Atlanta. As a result of a private exchange offering, stockholders and debenture holders of NCCC have deposited into escrow, for transfer to MCI, 50.3% of NCCC's outstanding common stock and 15.5% of its outstanding debentures. The transfer of control is to be later followed by the merger of NCCC into MCI Mid-Continent, a wholly owned subsidiary of MCI, and applicant has requested that action be withheld on the assignment application pending approval by the Securities and Exchange Commission of the stock issuance required for the merger.

3. It is indicated that NCCC requires additional financing in order to remain viable, and Continental Bank of Illinois has tentatively indicated that it would be prepared to advance NCCC additional funding up to approximately $1.5 million conditioned upon MCI's acquiring control. As contemplated, the acquisition would not create any significant financial drain on MCI because of such bank financing

[1] Public notice of the assignment application was given on April 1, 1974. Since the transfer of control application involves essentially the same acquisition as outlined in the assignment application, a separate 30 day notice period is not considered necessary.

and because the method of acquisition involves only an exchange of stock.

4. The applicants state that the proposed transfer would make available to NCCC the technical and managerial expertise of MCI. An additional advantage would be the potential cost savings resulting from the consolidation of some authorized but unconstructed microwave routes which would be duplicative in an integrated system. Moreover, it appears that the integration of the MCI and NCCC systems would be beneficial to MCI as well as NCCC since there would be a significant increase in the combined number of cities served, thereby increasing the communications markets in which MCI and NCCC can effectively compete.

5. Although the MMC objection is directed to the assignment application, it is equally applicable to the transfer of control application. Therefore we will dispose of it in connection with the transfer application. MMC contends that a change in ownership or merger of NCCC would constitute a major amendment of NCCC's pending applications (File Nos. 8288 through 8294–C1–P–72), which are mutually exclusive with pending applications of MMC (to relay network television signals to Sioux Falls, North Dakota), pursuant to the Commission's *Notice of Proposed Rule Making* in Docket No. 19905 (44 FCC 2d 556). Therefore, MMC opposes the grant of this application unless MCI acknowledges that such mutually exclusive NCCC applications will be subject to return (pursuant to Section 21.28(d) of the Rules).

6. We believe that it would be premature to now decide the matter raised by MMC. This question is not relevant to our consideration of the instant application (or the assignment application), but it will be given due consideration at the time those NCCC applications are amended to show the change in ownership.

7. As noted in paragraph 4, there are authorized to MCI and NCCC microwave routes which are unconstructed and which would be duplicative in an integrated system. MCI recognizes that such duplication is not warranted, but it indicates some reluctance to relinquish some authorizations of NCCC at this time due to the concerns of the minority shareholders of NCCC. Also, MCI requests some delay in relinquishing certain MCI authorizations upon which financing commitments have been made. We do not believe the public interest would be served by the construction of such parallel routes in an integrated system. Accordingly, approval of this application will be conditioned upon MCI relinquishing its authorizations for the routes Davenport, Iowa to Kansas City, Missouri, and Dallas to Houston, Texas, as well as those of NCCC for Springfield, Missouri to St. Louis, Missouri. However, we do believe the requested delay is not unreasonable.

8. In view of the foregoing, it is found that the proposed transfer of control would serve the public interest, convenience and necessity, and that MCI is technically, financially and otherwise qualified to control the facilities authorized to NCCC.

9. Accordingly, IT IS HEREBY ORDERED that the captioned application IS GRANTED.

10. IT IS FURTHER ORDERED, that the aforementioned objection of MMC IS DENIED.

11. IT IS FURTHER ORDERED, that this authorization IS SUBJECT TO THE CONDITION that the construction permits referred to in paragraph 7 herein BE RELINQUISHED within 30 days of the consummation of the merger proposed in File No. 3562-C1-AP/AL-(128)-74 but in no event later than December 31, 1974.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

47 F.C.C. 2d

FCC 74-564

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of APPLICATIONS OF THE OHIO ETV NETWORK COMMISSION IN THE LOCAL GOVERNMENT RADIO SERVICE FOR AUTHORIZATIONS TO OPERATE A CLOSED CIRCUIT MEDICAL/EDUCATIONAL TV MICROWAVE SYSTEM IN THE 6575–6875 AND 12200–12700 MHz BANDS	Files Nos. 6090–6096–PL–104X and 13618–13620–PL–24X

MEMORANDUM OPINION AND ORDER

(Adopted May 30, 1974; Released June 4, 1974)

BY THE COMMISSION: COMMISSIONER HOOKS CONCURRING IN THE RESULT AND ISSUING A STATEMENT; COMMISSIONER QUELLO NOT PARTICIPATING.

1. The Commission has before it applications filed by the Ohio ETV Network Commission (OETVNC) in the Local Government Radio Service for authorizations to operate a closed circuit medical/educational microwave system in the State of Ohio. Petitions to deny the applications have been filed by the Central Committee for Communications Facilities of the American Petroleum Institute (API) and by the Utilities Telecommunications Council (UTC).

2. The purpose of the applications is to establish closed circuit television facilities to connect various urban Ohio health care centers with health care centers located in remote areas of the Ohio Valley. The system will be 130 miles in length, with terminal points in Columbus and Athens, Ohio, as well as in other locations.

3. The proposed system will serve four functions: (1) it will provide the means for continuing the education of remote health care professionals; (2) it will permit physicians in Appalachia to consult on specific cases, via video, with recognized experts in urban centers; (3) it will allow patients in remote areas to have the benefits of highly sophisticated diagnostic equipment in urban centers; and (4) it will permit supervision of interns, residents, and less experienced physicians in rural areas by more highly skilled physicians in urban areas.

4. The applications request the authorization of (a) five 20 MHz wide channels in the 6575–6875 MHz band, and (b) ten 20 MHz wide channels in the 12200–12700 MHz band. The system will provide color video, associated broadcast-quality program audio, a party line interconnection voice channel, and two channels for the transmission of physiological data, such as electrocardiograms.

5. The problem with the applications arises because Rule Section 89.121 states that the normally assignable bandwidth in the 6575–6875 MHz band is 10 MHz. Additional bandwidth may be authorized

on a case-by-case basis when the applicant makes ". . . a complete and specific factual showing of unique or unusual circumstances, apart from economic considerations . . ." that additional bandwidth is required. Wider bandwidths are regularly authorized in the 12200–12700 MHz band, so that the issue before us is whether the proposed OETVNC system should be accommodated in that band.

6. OETVNC asserts that there are two "unique or unusual" circumstances which warrant the use of 20 MHz bandwidths in the 6 GHz band. First, three existing relay sites and four existing antenna systems could be used if the backbone of the proposed system were licensed in the 6575–6875 MHz band. The OETVNC system would simply "piggyback" an existing educational inter-city broadcast microwave relay system operating in the Broadcast Auxiliary 6875–7125 MHz band. If the entire OETVNC system were required to operate in the 12200–12700 MHz band, a minimum of 3 additional microwave relay stations would be needed because of the more limited range of microwave transmissions at these frequencies. In this connection, OETVNC expresses doubt that suitable sites for the additional relay stations can be found, and that even if they are found, such usage will have a negative environmental impact. Second, OETVNC states that the use of 6 GHz frequencies is essential if the system's end-to-end propagation reliability goal of 99.99% is to be met. It is claimed that the use of 12 GHz frequencies throughout the system will signficantly degrade system reliability because these frequencies are more susceptible to rainfall outage than 6 GHz frequencies. OETVNC points out that their system will, on occasion, carry programming which could involve life-or-death situations, and for this reason, a very high degree of system reliability is of great importance.

7. In the petitions to deny filed by API and UTC, concern was expressed about the amount of spectrum in the 6 GHz band to be occupied by the proposed OETVNC system. Specifically, these petitions object to the use of bandwidths in excess of 10 MHz in the 6575–6875 MHz band when numerous 12 GHz frequencies of 20 MHz bandwidth are available in the system's area of operation. The petitioners argued that a grant of the applications would have an adverse impact on the future availability of frequencies in the 6 GHz band in Ohio. We recognize, of course, the issue raised by the petitioners goes beyond the instant application. They point out, first, that authorization of wide-band video systems in the 6575–6875 MHz band is contrary to the Commission's policy announced in Docket 11866,[1] under which radio systems requiring a significant amount of radio spectrum should be authorized on frequencies above 10,500 MHz. The 6575–6875 MHz band can provide twenty-nine 10–MHz channels or fourteen 20–MHz channels (see Section 94.65(g) in Docket 19869). It is now used extensively for long haul conventional microwave systems. It is occupied mainly by public safety licensees, railroads, electric and gas utilities, and by petroleum and gas pipelines. It is available for long haul communications in all Safety and Special Radio Services, except in Business, Citizens and Amateurs. Proposals in Docket 19869 would somewhat expand eligibility for the use of this band

[1] 27 FCC 359.

104–041—74——7

for conventional communication systems. Although the band is not yet generally saturated, shortages of frequencies are being experienced in major microwave communications corridors. For these reasons, the Commission has proposed to tighten existing technical standards in an effort to accommodate more users. Against this background, API and UTC argue that continued authorization of wide band video systems would result in the early saturation of the band in many more areas. They also argue that there is sufficient bandwidth to accommodate this and other wide band video systems in the 12200–12700 MHz band, and that the frequencies in that band are suitable in most situations for reliable systems.

8. We recognize the importance of the overall issue raised by the petitioners, and we will re-evaluate our past practices with respect to authorizing wide-band systems in the 6575–6875 MHz band. In this connection, we will consider, as the petitioners have urged, among other things, a petition (RM–1878) filed by API urging the Commission to adopt rules which would accommodate closed circuit educational television systems in the broadcast auxiliary band 6875–7125 MHz. We will also explore the conditions, if any, under which such systems may continue to be authorized in the 6575–6875 MHz band. Further, in order to maintain the status quo pending our re-evaluation of this matter, we will not accept new applications for wide-band video systems in the 6575–6875 MHz band until further order of the Commission.

9. We will, of course, continue to accept such applications for authorizations in the 12200–12700 MHz band. We want to emphasize that our experience with the frequencies in this band indicates that they are well-suited for wide-band applications, even in many instances where multiple hops are employed and high reliability is required. Indeed, several such systems are already in operation in that band, some carrying medical/educational programming.

10. As we have indicated, the Commission in the past has authorized a number of wide-band video systems in the 6575–6875 MHz band on the basis of a showing similar to that made by Ohio ETV. We recognize that Ohio ETV and the others have planned their systems and filed their applications in reliance on previous actions of the Commission. Therefore, it seems appropriate to grant the Ohio ETV applications and to also act on the pending applications for similar systems in accordance with previous Commission actions in this area.

11. Accordingly, IT IS ORDERED, That the requests by API and UTC are DENIED to the extent indicated in the foregoing Opinion, and That the staff is authorized to grant the applications.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

CONCURRING STATEMENT OF COMMISSIONER BENJAMIN L. HOOKS

In Re: Application filed by the Ohio ETV Network Commission, Oklahoma State Regents for Higher Education, and Central Texas College for authorizations in the 6575–6875 and 12200 to 12700 MHz bands.

I concur with the Commission's action, but I do not believe it goes far enough. While I believe that wide band video systems serve important educational and medical purposes and should be accommodated in the radio spectrum, our responsibility to promote efficient use of the radio spectrum requires us to do more than the Commission has done here. The petitioners have urged that this as well as other wide band video systems in the private services should be accommodated on bands above 10,000 MHz and the Commission seems to agree that the 12200–12700 MHz band is well suited for such applications. Much more frequency spectrum is available in the 12200 MHz band than in the 6500 MHz band in which the Ohio ETV application was granted. While I can appreciate my colleagues' concern with the applicant's reliance on past Commission's actions, I feel that it is our responsibility to examine each application on its own merits. I am not convinced completely that technically this system could not very well be accommodated on frequencies in the 12200 MHz band.

The Commission's undertaking to re-evaluate this whole matter and its imposition of a temporary freeze is a step in the right direction and, therefore, I concur.

FCC 74-576

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
PLEASANT BROADCASTING CO., MT. PLEASANT, IOWA	Docket No. 18594 File No. BP-17235
DONALD K. VAN SLYKE, VERNE MCDONOUGH, JAMES J. DELMONT, ALFRED R. SUNDBERG, DWIGHT C. VREDENBURG, MARION M. COONS, VIRGIL MEYER, ROBERT M. STONE, CLARENCE H. MORTON, W. M. EIKENBERRY, JOHN E. KING, ALDO DELLA VEDOVA, GEORGE R. GARTON AND LEVORAH KELLER, D.B.A. CHARITON RADIO CO., CHARITON, IOWA	Docket No. 18595 File No. BP-17559
BCST CO. OF IOWA, INC., MT. PLEASANT, IOWA For Construction Permits	Docket No. 18596 File No. BP-17571

MEMORANDUM OPINION AND ORDER

(Adopted June 5, 1974; Released June 11, 1974)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE NOT PARTICIPATING.

1. In an Order, FCC 73-966, released September 24, 1973, the Commission denied review of Review Board actions (40 FCC 2d 582, released April 17, 1973, reconsideration denied 41 FCC 2d 344, released June 14, 1973) granting the application of BCST Company of Iowa, Inc. (BCST) for a new standard broadcast station at Mt. Pleasant, Iowa. Pleasant Broadcasting Company (Pleasant), licensee of Station KILJ (FM) at Mt. Pleasant, appealed the Commission's order (C.A.D.C. Case No. 73-2071). Now before the Commission is a motion filed May 29, 1974, by Pleasant, requesting a stay of the effectiveness of the Commission's order denying review of the Review Board's actions. Pleasant argues that the grant of BCST's application violates the mandate of Section 307(b) of the Communications Act which requires a fair, efficient, and equitable distribution of radio frequencies, and it contends that if BCST is permitted to complete construction and obtain operating authority before resolution of the pending appeal, both Pleasant and the public interest may suffer irreparable injury.

2. We have repeatedly stated that it is not our practice to grant stays pending judicial review unless there is a substantial showing by the petitioner that it will suffer irreparable injury or that the public interest will be adversely affected, and that there is a reasonable likelihood that it will succeed on the merits of its appeal. See *Carter Broadcasting Corp.*, 12 FCC 2d 316 (1968); *Waterman Broadcasting Corp.*, 12 FCC 2d 300 (1968); *Alvin B. Corum, Jr.*, 5 RR 2d 18 (1965). Pleasant has not made an adequate showing to substantiate its allega-

tion of irreparable injury either to itself or to the public interest. In contrast, a stay of the effectiveness of the Commission's order would adversely affect the public interest by delaying the institution of a new service, if the Commission's Order is sustained on the appeal.

3. Accordingly, IT IS ORDERED, That the motion for stay, filed May 29, 1974, by Pleasant Broadcasting Company, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74–586

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
REQUESTS FOR WAIVER OF THE PRIME TIME ACCESS RULE, § 73.658(k)(1) OF THE COMMISSION'S RULES (AS AMENDED EFFECTIVE SEPTEMBER 1974) FOR THE 1974 FOOTBALL SEASON BY STATIONS WKRC–TV, CINCINNATI, AND STATION WKEF–TV, DAYTON, OHIO.

MEMORANDUM OPINION AND ORDER

(Adopted June 5, 1974; Released June 6, 1974)

BY THE COMMISSION: CHAIRMAN WILEY CONCURRING IN RESULT. COMMISSIONER REID DISSENTING AND COMMISSIONER QUELLO NOT PARTICIPATING.

1. The Commission here considers a request for waiver of the prime time access rule, § 73.658(k)(1) of the Commission rules (as amended effective September 1974) filed on April 19, 1974 by Taft Broadcasting Company, licensee of Station WKRC–TV, Cincinnati, Ohio, to permit an adjustment of its Monday night programming during the 1974–75 professional football season so that a locally produced sports program may be presented at 8:30 p.m. local time, and the regular ABC network program at that time, *The Rookies*, may be presented from 7:30 to 8:30 instead of 8:00 to 9:00 (it would be delayed nearly a week). The latter part of this arrangement is not permitted under the amended prime time access rule, which becomes effective this September. We also consider a similar request filed May 14, 1974 by Springfield Television Broadcasting Corporation, licensee of Station WKEF(TV), Dayton, Ohio, which apparently will rebroadcast from WKRC–TV the local Cincinnati sports program. This program concerns the Cincinnati Bengals pro football team, and these stations wish to present it as, in effect, a "pre-game show" before ABC's regular Monday night football games.

2. The prime time access rule, as originally adopted in 1970, provided that affiliated stations in the top-50 markets could devote no more than three hours of prime time (7–11 p.m. E.T.) per night to network programs, starting in October 1971. Under the original rule, no time was specified as an access period which was to be free of network and off-network programming. In a 1971 letter to the three networks, the Commission stated that the hours of prime time to be used by the networks could have an effect upon the operation of the rule, and stated its belief that the selection of the 8:00–11:00 p.m. time

period would better serve the public interest.[1] In practice the general custom of the networks has been to start their programming at 8:00 p.m. E.T. except at 7:30 E.T. on Sundays.

3. In January 1974, after a lengthy proceeding concerning the prime time access rule (Docket 19622), we made a number of changes in the rule, one of which was to specify definite "access" or "cleared" time periods in the rule itself—the half-hour from 7:30 to 8:00 E.T. and P.T. (6:30–7:00 C.T. and M.T.) Monday through Saturday. See § 73.658(k)(1). In connection with this change, we stated in the Docket 19622 *Report and Order* (par. 85, 44 FCC 2d 1081, 1135):

> As mentioned earlier, one of the complaints against the rule has been its "lack of flexibility", in requiring one hour of "cleared" time every evening rather than permitting deviations to 3½ hours of network or off-network material on some nights with a corresponding cutback on other nights, or a flat weekly "21 hours a week" limitation on such material. The Notice proposals and the comments in this respect have been noted above. We are, of course, moving in the other direction in the rule amendment adopted herein, by specifying not only the amount of cleared time each evening Monday—Saturday, but the portion of the evening when it is to occur. We have done this in the interest of certainty and stability—letting networks and stations know what time will or will not be available for general use (for them and for their competitors as well) and giving independent producers a specific time-period, and therefore a particular composition of audience, to aim at. Moreover, there is substantial significance in the argument that it is better, at this still rather early stage of the rule, for "access period programing" to be shown opposite similar material on other stations, rather than to have it shown in competition with perhaps the most popular network shows . . . . For these reasons, it appears that the cause of flexibility is outweighed by the additional stability and certainty thus gained—particularly with the flexibility which has been added with respect to the first half hour of prime time.

4. *Arguments of the petitioners.* Station WKRC–TV, which presented the Bengal football program at 8:30 Monday in 1972 but not 1973,[2] states that it is paradoxical that something permissible under the present prime time access rule will be impermissible under the new rule starting in September, when the latter was intended to be a "relaxation".[3] It argues that the local needs and the public interest would best be served in this situation if the local pre-game show is presented in the most logical time period, the half-hour immediately preceding the Monday night football game; and that likewise, the public interest would not be served if the very popular network program, *The Rookies*, is forced into a less desirable time period or not shown at all. WKRC–TV points out that under its proposed schedule, the amount of network programming will remain the same, 3 hours, on Monday nights and that this request is limited in scope to Monday nights during the 1974–75 football season. Therefore, we are urged to grant this request because there is assertedly no legitimate public interest to be served by denial. WKRC–TV also asserts that numerous other ABC affiliates in the top-50 markets may have the same problem. WKEF makes much the same arguments, also asserting that there is a high degree of interest on the part of viewers in the Dayton area

[1] FCC News, Report No. 974, March 12, 1971. "8–11 p.m. TIME PROPOSED BY COMMISSION TO NETWORKS."
[2] According to ARB audience survey data for November 1973, the "Bengal Review" program was presented on another Cincinnati station (NBC-affiliated) Mondays at 7 p.m.
[3] See Public Notice #16746, Report No. 9117, released January 24, 1974 "PRIME TIME RULE EASED BY FCC."

in the Cincinnati team. It is claimed that ". . . strict application of the prime time access rule would result in the public's being denied maximum attractive programming on Monday evenings."

DISCUSSION AND CONCLUSIONS

5. Upon consideration of the foregoing we are of the view that these requests must be denied. As stated in recent decisions upon requests for off-network waivers,[4] we have held a thorough inquiry into the prime time access rule, including consideration of the issue presented in the requests by WKRC–TV and WKEF(TV). There is a burden upon any party requesting waiver in an area dealt with in Docket 19622 decision, and that burden has not been met in this instance. In the passage quoted in paragraph 3, *supra*, we found that the cause of certainty outweighs that of flexibility, and we find nothing in the petitions dealt with here to alter that finding. The specified time period has the advantages of letting the networks and affiliates know what times are and are not available for particular kinds of programming, and also of providing producers of access programming a specific time at which to aim. There is also, and perhaps more important, the need for some protection for "access period programming" on the other affiliated stations, here the two in Cincinnati and two in Dayton, which would be faced with competition from the network program, *The Rookies*, at least at this point in time under the new rule.[5]

6. In denying this request we are by no means foreclosing WKRC–TV from presenting any of the programs it wishes to. It may present the local sports program at 7:30 and *The Rookies* at 8:00 p.m., thus preserving the usual arrangement.[6] Even if the half-hour immediately preceding the football game is crucial in this case, WKRC–TV is not prevented from presenting its pre-game program; it simply is prohibited from placing the network program in the access period, which likewise does not prohibit that program's presentation on some other evening if not Mondays. In sum, WKRC–TV does have other options available and is not prohibited from showing any program which it seeks to present. We cannot agree with WKRC–TV that the public interest would be served by granting the waiver. Rather, looking at the broader public interest rather than the immediate convenience of WKRC–TV and those watching its Monday programs, we conclude that it is better served by denial.

7. We have decided this matter on the basis of the two requests before us. However, there is the additional consideration of what other waivers might have to be granted, or at least considered, on the same basis. If WKRC–TV is correct in believing this to be a problem for many ABC affiliates, presumably many such stations would be entitled

[4] 45 FCC 2d 512 (1974).

[5] We note in this connection that both of these requests were served on the other stations in the respective markets (three in Cincinnati, two in Dayton), and no opposition was indicated. However, this might be due to factors other than a belief that there would be no competitive impact—e.g., the thought that they might themselves be seeking waiver in the future—and we cannot attach a high degree of significance to it.

[6] It is noted that of 6 programs of this type shown Mondays on stations in NFL cities in the fall of 1973, only one (Miami) was on an ABC affiliate just before the ABC game. One (Detroit) was presented at that time on an independent station; three were at 7:30 E.T. or 6:30 C.T. (one of them ABC); and one was at 7 (Cincinnati NBC). See ARB audience survey report for November 1973.

to the same waiver, meaning deviations from the rule, with the attendant consequences, in many of the top 50 markets for more than a quarter of the broadcast year.[7] There are other kinds of situations in which waiver might be urged on the basis of our action here, and which might be difficult to distinguish. The whole objective of certainty in administration of the rule might thus be jeopardized.

8. Finally, our action here, and the observations above, are to be considered in the context of the requests before us—for waiver which would involve something like 14 weeks, or more than a quarter of the year.[8] We recognize the need for some licensee flexibility, and, as under the old rule, it may be appropriate to act differently with respect to waivers for "one-time" program adjustments, or conceivably even a larger number such as three or four. These questions we do not now decide. We simply say that waiver to the extent which would be involved here, under the circumstances involved in these requests, should not be granted.

9. In view of the foregoing, IT IS ORDERED. That the requests for waiver of the prime time access rule, § 73.658(k)(1) of the Commission's Rules (as amended effective September 1974) filed on April 19, 1974 by Taft Broadcasting Company and on May 14, 1974 by Springfield Television Broadcasting Corporation, to permit the presentation of the network program *The Rookies* during the 7:30–8:00 p.m. access period on Monday nights during the 1974 football season, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

[7] 20 top-50 markets cities (besides those on the West Coast) have NFL teams, plus Milwaukee where some Green Bay home games are played. Other nearby cities, such as Dayton here, could also be involved.

[8] While not set forth in either of the petitions, we understand that ABC's Monday night series will include 17 games (14 regular and three pre-season), of which probably 14 will occur after the effective date of the new rules in September.

104-041—74——8

FCC 74-513

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
PETITION FOR WAIVER AND AMENDMENT OF THE RULES TO PERMIT USE OF FREQUENCY 5370 kHz AT NOME, ALASKA	Docket No. 20050 RM No. 2306

NOTICE OF PROPOSED RULEMAKING AND ORDER

(Adopted May 14, 1974; Released May 17, 1974)

BY THE COMMISSION: COMMISSIONER QUELLO NOT PARTICIPATING.

1. RCA Alaska Communications, Inc. (RCA Alascom) has filed an application for modification, petition for rulemaking and request for rule waiver. By these pleadings RCA Alascom seeks temporary and permanent authority to use the frequency 5370 kHz at its Alaska Fixed Public/Public Coast II–A and II–B station, call signs WGG–55/WKR located at Nome, Alaska.

2. Alascom has filed an application for modification of its station at Nome, Alaska. No opposition to the application has been filed. However, coordination with the Interdepartment Radio Advisory Committee has shown that this frequency is presently shared with other Federal Government stations and therefore this frequency will be authorized on a noninterference basis to the existing Federal Government facilities. Further, extensive analysis of the use of 5370 kHz at Nome by Alascom and by the Commission's staff, indicates that no interference to any other station is likely to result by the grant of these requests. Accordingly, a waiver of the rules to permit such use during the pendency of this rule making proceeding appears warranted. If, in fact, interference should result, such operation should bring it to light. In such a case, the temporary authority will cease until termination of this rule making proceeding. The waiver to permit this operation, on a noninterference basis, will be granted in the ordering paragraphs below.

3. Amendment of the rules to permit permanent use of 5370 kHz at Nome also appears warranted.

4. In view of the above, IT IS ORDERED, That Section 81.713 of the rules IS WAIVED to permit use of the frequency 5370 kHz at Nome, Alaska pending the termination of this proceeding provided that no interference results to any other station.

5. The proposed amendment as set forth in the attached Appendix is issued pursuant to the authority contained in Section 303 of the Communications Act of 1934, as amended.

6. Pursuant to the applicable procedures set forth in Section 1.415 of the Commission's rules, interested persons may file comments on or before June 28, 1974, and reply comments on or before July 8, 1974.

All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding.

7. In accordance with the provisions of Section 1.419 of the Commission's rules, an original and 14 copies of all statements, briefs or comments shall be furnished the Commission. All comments received in response to this Notice of Proposed Rule Making and Order will be available for public inspection in the Docket Reference Room in the Commission's Offices in Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

In § 81.713 the table is amended by adding the paired frequencies 5370 kHz and 5134.5 kHz to read as follows:

§ 81.713 Pairing of common carrier and Alaska-public fixed frequencies.

The pairing of frequencies available for communication between common carrier fixed stations (CCFS), as set forth in § 81.712, and Alaska-public fixed stations (APFS), as set forth in § 81.711, is given in the following table.

For communication with common carrier stations located at	Frequencies available until Jan. 1, 1974		Frequencies available after Jan. 1, 1974	
	CCFS transmit (kHz)	APFS transmit (kHz)	CCFS transmit (kHz)	APFS transmit (kHz)
Anchorage	3183	2256	3183	3365
	5370	3357		5137.5
		5137.5		2253
Bethel	2604	2632	2604	2629
				5204.5
Cold Bay	2312	2694	3241	2691
	3241	5137.5		
	4035			
Cordova	2312	2632	2312	2632
Fairbanks	3167.5	2632	3167.5	3354
		3357		5207.5
		5207.5		
Juneau	2784	2694	2784	2694
	3241	3357	3241	3357
Ketchikan	2604	2256	2604	2256
	3303	2776	3180	2776
King Salmon	3303	2644	3164.5	2466
Kodiak	2784			
	2604	2474	2781	2474
Kotzebue	2604	2466	2601	2463
Nome	2784		5370	5134.5
	2400	2474	2784	2471
Sitka	2400	2240		
Unalaska	2312	2632	3238	3362
	4035	3365	5370	5134.5

FCC 74-583

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Applications of RCA GLOBAL COMMUNICATIONS, INC., RCA ALASKA COMMUNICATIONS, INC. For Authority To Construct Communications Satellites To Provide Domestic Satellite Services	Files Nos. 13-16-DSS-P-71

ORDER

(Adopted June 5, 1974; Released June 7, 1974)

BY THE COMMISSION: COMMISSIONER QUELLO NOT PARTICIPATING.

1. By previous orders we have granted RCA Global Communications, Inc. and RCA Alaska Communications, Inc. (RCA applicants) partial waivers of construction permits pursuant to Section 319(d) of the Communications Act to permit expenditures of limited amounts toward procurement and construction of the satellites proposed in the above-captioned applications (e.g., Order of May 1, 1974 FCC 74-462).

2. On May 23, 1974 the RCA applicants requested authorization of an additional expenditure of not more than $2.1 million to cover the cost of satellite procurement for the next 30 days, plus $500,000 to initiate procurement of launch services for a third satellite. In support of this request the RCA applicants rely on the reasons asserted in their prior requests for waiver and state their willingness to accept the conditions previously imposed.

3. Upon consideration of the showing made by the RCA applicants and in view of the financial commitments made by RCA Corporation (July 26, 1973 Order, FCC 73-795), we conclude that the public interest would be served by a further partial waiver of construction permits.

4. Accordingly, IT IS HEREBY ORDERED, that the RCA applicants ARE GRANTED a further partial waiver of construction permits pursuant to Section 319(d) of the Communications Act to permit a further expenditure of not more than $2.1 million toward construction of three communications satellites and $500,000 toward procurement of launch services for the third satellite. This action does not constitute any determination on the merits of the above-captioned applications for construction permits or in any way prejudge the Commission's disposition of the separate corporation issue or any other issues pertaining to the subject applications. Any payment made by the RCA applicants towards construction of such satellites and for launch services shall be undertaken entirely at the risk of the stockholders of RCA Globcom. This waiver is issued upon the express condition that in the event the above-captioned applications for construction permits for satellites are not ultimately granted, any related

procurement and construction costs incurred pursuant to this waiver will not be included in any rate base of RCA Globcom or RCA Alascom, or charged to expense for rate purposes, but will be charged wholly against RCA Corporation in accordance with the resolution of its Board of Directors, dated July 11, 1973.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-555

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re ROLLINS CABLEVISION, ELSMERE AND NEWPORT, DEL. Request for Special Relief	CSR-337 (DE010) CSR-338 (DE022)

MEMORANDUM OPINION AND ORDER

(Adopted May 29, 1974; Released June 5, 1974)

BY THE COMMISSION: COMMISSIONERS REID AND HOOKS CONCURRING IN THE RESULT.

1. On March 8, 1973, Rollins Cablevision, operator of cable television systems at Elsmere and Newport, Delaware,[1] filed a "Petition for Special Relief and Waiver" (CSR-337, 338) requesting a waiver of former Section 74.1105 of the Commission's Rules [2] and a ruling that its Elsmere and Newport, Delaware cable television systems are authorized to carry signals pursuant to Sections 76.65 and 76.159 of the Commission's Rules. On April 9, 1973, Taft Broadcasting Company, licensee of Station WTAF-TV, Philadelphia, Pennsylvania, and WPHL-TV, Inc., licensee of Station WPHL-TV, Philadelphia, Pennsylvania, filed respectively an "Opposition to Petition for Special Relief and Waiver" and a "Response to Petition for Special Relief and Waiver." On April 30, 1973, Rollins filed a "Reply to Oppositions to Petition for Special Relief."

2. Rollins operates twelve channel cable television systems in the above-captioned communities, and carries the following signals on both systems:

WHYY-TV (Educ., Ch. 12), Wilmington, Delaware.
WBAL-TV (NBC, Ch. 11), Baltimore, Maryland
WJZ-TV (ABC, Ch. 13), Baltimore, Maryland
WMAR-TV (CBS, Ch. 2), Baltimore, Maryland
WKBS-TV (Ind., Ch. 48), Burlington, New Jersey
WGAL-TV (NBC, Ch. 8), Lancaster, Pennsylvania
KYW-TV (NBC, Ch. 3), Philadelphia, Pennsylvania
WCAU-TV (CBS, Ch. 10), Philadelphia, Pennsylvania
WPHL-TV (Ind., Ch. 17), Philadelphia, Pennsylvania
WPVI-TV (ABC, Ch. 6), Philadelphia, Pennsylvania
WTAF-TV (Ind., Ch. 29), Philadelphia, Pennsylvania

[1] Rollins also operates cable television systems in Newark, Wilmington, and the unincorporated areas of New Castle County, Delaware.

[2] Former Section 74.1105 provided in relevant part that: (a) No CATV system shall commence operations in a community . . . unless the system has given prior notice of the proposed new service to the licensee or permittee of any television broadcast station within whose predicted Grade B contour the system operates or will operate. . . .

KYW–TV, WCAU–TV, and WPVI–TV's specified zones encompass Elsmere and Newport, Delaware, while the other network affiliates are non-market signals and place only predicted Grade B contours over these communities.

3. Rollins admits that it commenced cable television service in Elsmere and Newport, Delaware, in 1970 and 1971 respectively without giving notification pursuant to former Section 74.1105(a) of the Commission's Rules. Accordingly, carriage of WJZ–TV, WMAR–TV, WBAL–TV, and WGAL–TV is inconsistent with Section 76.61 of the Rules unless grandfathered. Rollins argues, however, that its noncompliance with former Section 74.1105 of the Rules was inadvertent and immaterial, because neither system carries distant signals, and because its signal carriage was otherwise consistent with the former Rules. Rollins also contends that it cannot correct the mistake without shutting down its properly authorized Newark and New Castle County cable television systems, because all four systems are served from a common headend in New Castle County. Finally, Rollins argues that failure to grant the requested waiver will deprive its subscribers of service which they have had for at least two years.

4. Neither Taft Broadcasting nor WPHL–TV, Inc., opposes Rollins' continued carriage of the four non-market network affiliates. They do oppose Rollins' Petition to the extent, however, that it would confer full grandfather status on the carriage of these four signals and thereby deprive WTAF–TV and WPHL–TV of the syndicated program exclusivity otherwise available under the rules.

5. We reject Rollins' arguments that its Elsmere and Newport, Delaware, cable television systems should be treated as fully grandfathered. Although the Elsmere and Newport systems' signals would not have been classified as distant under the former rules, Rollins still was required to give notice pursuant to former Section 74.1105; its failure to do so prevents these signals from being authorized under Sections 76.65 and 76.159. If Rollins had given proper notice, Taft Broadcasting and WPHL–TV, Inc., could have objected to Rollins' proposed carriage of WBAL–TV, WJZ–TV, WMAR–TV and WGAL–TV[3]; under the interim processing procedures adopted in our *Notice of Proposed Rulemaking and Notice of Inquiry in Docket No. 18397*, 15 FCC 2d 417, 437–438 (1968), we would not have held a hearing to resolve the objection. Rollins' failure to give notice therefore prejudiced substantial rights of those entitled to receive notice.

6. We nevertheless will authorize Rollins to continue carrying the current signals on its Elsmere and Newport, Delaware, cable television systems. Denial of the requested special relief would be inappropriate, because no interested party opposes continued operation and because it would disrupt established viewing habits. We do not confer full

[3] WBAL–TV, WJZ–TV, WMAR–TV, and WGAL–TV are located in major markets, while Elsmere and Newport also are within a major market. As we stated in footnote 69 to our *Second Report and Order in Docket No. 14895*, 2 FCC 2d 725 (1966): "If two major markets each fall within one another's grade B contour (e.g., Washington and Baltimore), this does not mean that there is no question as to the carriage by a Baltimore CATV system of the signals of Washington; for in doing so and thus equalizing the quality of the more distant Washington signals, it might be changing the viewing habits of the Baltimore population and thus affecting the development of the Baltimore independent UHF station or stations. Such instances rarely arise, and can, we think, be dealt with by appropriate petition or Commission consideration in the unusual case where a problem of this nature might arise."

grandfather status on these cable television systems' carriage of WJZ–TV, WMAR–TV, WBAL–TV, and WGAL–TV, however, to the extent of depriving WTAF–TV and WPHZ–TV of the syndicated program exclusivity protection otherwise available under the rules.

In view of the foregoing, the Commission finds that a partial grant of the requested special relief and waiver would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Petition for Special Relief and Waiver" filed March 8, 1973, by Rollins Cablevision IS GRANTED to the extent indicated above.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-550

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re THE AMENDMENT OF PART 21 OF RULES AND REGULATIONS, APPLICABLE TO DOMESTIC PUBLIC LAND MOBILE RADIO SERVICE TO ALLOW "SIGNALING COMMUNICATIONS" BY SUB-AUDIBLE MEANS OF INFORMATION INTENDED FOR RECEPTION AT MULTIPOINT MOBILE AND/OR FIXED POINTS	Docket No. 19939 RM-2222

REPORT AND ORDER

(Adopted May 29, 1974; Released June 4, 1974)

BY THE COMMISSION:

1. On February 19, 1974, the Commission released a Notice of Proposed Rule Making in the above-referenced proceeding (FCC 74-149, 45 FCC 2d 290). Since that time the petitioner, CSA Applications, Inc., has changed its name to Laser Credit Control, Inc. (Hereinafter "LCC"). The basic purpose of this rule making was set out in paragraph 2 of our Notice:

> Using facilities leased from mobile common carriers, CSA, which is a communications system corporation, seeks to offer one-way delivery of a "package" of digital information to a large number of mobile and/or fixed points. The digital information "package" is intended to be received at many hundreds of retail locations in a given metropolitan area by an "extremely low-cost" combination of a receiver and miniature computer designed and developed by CSA. This miniature computer can carry out simple "inquiry and response" functions necessary in ordinary retail transactions such as credit card verification.

We also set out our reaction to the proposal in paragraph 14 of the Notice:

> Since the service proposed by CSA could apparently be accommodated with no increased use of the radio spectrum, we find it is in the public interest to issue this Notice of Proposed Rule Making.

Provision was made for Comments to be filed on March 29, 1974, and Reply Comments on April 10, 1974.

2. Comments were filed by LCC, Airsignal International, Inc., Airways Communications, Autophone Company, GT&E Service Corporation, the National Association of Radiotelephone Systems (NARS) and RAM Broadcasting Company. Most of these comments need not be summarized in detail, since all favored the proposal and pointed out that it would provide a useful service without requiring any new frequency allocation.

3. While all comments were favorable, some points raised should be mentioned. First, NARS stated that the question it had raised in a previous comment had been answered to its satisfaction by LCC.

4. Next, Airsignal International, Inc., noted its earlier comments in support of LCC's Petition for Rule Making and its "active interest" in LCC's proposed service. Airsignal further stated that it had "reviewed with approval" the developmental report relating to LCC's service submitted, on behalf of LCC, by United Telephone Company of Ohio. Although Airsignal indicated that its "more detailed comments" would be reserved until "a thorough study of (LCC's) further particularization of its proposal," Airsignal commented that "it clearly wishes to indicate its continuing support of the (LCC) proposal".

5. Finally, the GTE Service Corporation (GT&E), commenting on behalf of the telephone operating companies of the General System, also expressed its support for the proposed amendments of Part 21. GT&E stated that "the proposed rules, if adopted, would not only provide for the establishment of a useful communications service, but would do so without taking valuable spectrum space from existing radio services." If sufficient safeguards are incorporated in the new service, GT&E noted, the proposed digital information service would be offered without interference with sub-audible paging service. GT&E further noted that common carriers must know what equipment will be required "for the appropriate interface of the sevice with the various mobile services they now provide, such as IMTS, MTS and one-way paging." GT&E further suggested that the amended rules should "include a specific bit rate and time requirement for updating of remote terminals, and the determination of whether only one channel will be utilized or whether the proposed (LCC) receivers will be capable of idle channel hunting." GT&E stated its belief that, with the suggested modifications, "the Commission should adopt the proposed Rules . . ."

6. Reply comments were filed by Airsignal and LCC. Airsignal stated that its problems had been answered by LCC and it now fully supported the proposal. LCC, in its reply, focused primarily on the GT&E comments.

7. With reference to GT&E's comments which request data about the appropriate interface of LCC's service with existing mobile services, LCC noted that the transfer to the IMTS, MTS or one-way paging transmitters would be at the same impedance level as presently used paging tone inputs. As to specifying a bit rate requirement for updating receiver-terminals, LCC believed that this matter is an operational decision and should be determined by radio station operators. It stated that during its tests using United Telephone of Ohio's IMTS facilities, LCC used a single tone with phase reversal keying to provide the digital format; and it used a bit rate of 110Hz. However, other sub-audible frequencies such as 112Hz, 115Hz and so forth could be used equally well, it believed. As noted above, LCC submitted that the bit rate need not—and should not—be specified in the rules but should, as an operational matter, be determined by the station operator.

8. LCC further believed that no time requirement for updating need be specified in the proposed amendments to Part 21, as urged by GT&E, because of the interruptible character of LCC's proposed service in the event the sub-audible channel is required for paging.

Further, digital transmission would normally take place in low demand periods such as after midnight. In view of the likely variations in the time necessary for updating and the ability of LCC's service to operate without interference with existing services, LCC submitted that no time requirements for the proposed service need be incorporated in the proposed amendments.

9. LCC concluded that, "after consideration of these operational characteristics of LCC's proposed service, GT&E has indicated to LCC that no modifications are required in the proposed amendments to Part 21. GT&E has authorized LCC to state that it now urges the adoption of the amendments to Part 21 as proposed by the Commission".

10. We agree with LCC that purely operational requirements are not necessary in the amended rules. The carriers who provide this service are under an obligation to maintain control of this operation to operate without interference to their primary operations, and we will make this explicit in the rule adopted herein. From the information contained in the developmental report submitted by United Telephone Company of Ohio, February 14, 1974, concerning their test programming of an LCC system, it appears that this is practicable. Thus we find that the operation proposed is feasible, will benefit the public, and will not require any frequency allocation. In view of this finding, we have concluded that the LCC proposal should be allowed and the rules amended as set out in the Appendix.

11. Authority for the action taken herein is contained in Sections 4 and 303 of the Communications Act of 1934, as amended.

12. Accordingly, IT IS ORDERED, That effective July 12, 1974 Sections 21.1 and 21.509(e) of the Commission's Rules ARE AMENDED as set out in the Appendix.

13. It is FURTHER ORDERED, That this proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

The specific amendments adopted are as follows:

1. In Part 21, Subpart A, Section 21.1 the definition of "signaling communications" is amended to read as follows:

* * * * * * *

Signaling communication. One-way communications from a base station to a mobile receiver or to multipoint mobile and/or fixed locations by subaudible means for the purpose of actuating a signaling device in the mobile unit, for communicating information to the desired mobile unit or for communicating information for reception at multipoint mobile and/or fixed locations.

* * * * * * *

2. Section 21.509(e) is amended to change present paragraph (e) to sub-paragraph (e)(1) and to add a new sub-paragraph (e)(2) as follows:

* * * * * * *

(e)(2) Base stations in this service may also be authorized to render one-way signaling communications service by subaudible means to multipoint mobile and/or fixed locations for purposes of communicating information intended for reception at multipoint mobile and/or fixed locations, provided that this does not interfere with normal communications.

* * * * * * *

FCC 74-598

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF THOUSAND ISLANDS CORPORATION, LICENSEE OF RADIO STATION WVWI, ST. THOMAS, VIRGIN ISLANDS
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted June 5, 1974; Released June 10, 1974)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE NOT PARTICIPATING.

1. The Commission has under consideration (1) its Notice of Apparent Liability dated August 2, 1973 (mailed August 7, 1973), addressed to Thousand Islands Corporation, licensee of Radio Station WVWI, St. Thomas, Virgin Islands and (2) licensee's response to the Notice of Apparent Liability dated September 13, 1973.

2. The Notice of Apparent Liability was issued because of the licensee's apparent violations of Section 1304, Title 18, United States Code, in that the licensee broadcast information [1] concerning a lottery from June 29 through August 15, 1972, consisting of seven thirty-second run-of-schedule announcements per day Monday through Saturday, for a total of 287 announcements. The Notice indicated that the licensee was subject to apparent forfeiture liability in the amount of two thousand dollars ($2,000) pursuant to Section 503(b) of the Communications Act of 1934, as amended. Examples of the various announcements broadcast are as follows:

30" RADIO

J & B gives you nothing but the best, and now is no exception. J & B gives you—

The 1956 Silver Cloud Rolls Royce!

Go to your favorite liquor store or supermarket and look for the J & B poster giving all the details on this fantastic offer. Don't wait another minute]

On August 16th the name of the winner will be drawn and that lucky person will drive away in one of the most beautiful cars in the world.

(pause)

I wonder if I'll have to widen my driveway?
Account: J & B
Music
30" Radio spot: "rolls"
Music (establish & fade under)
Man: *Win* with a winner!
Woman: J & B rare scotch whiskey
Man: and *win* the J & B *Rolls Royce!!!*

[1] The proceeding was confined to those violations occurring within one year prior to issuance of the Notice of Apparent Liability.

Woman: Yes, J & B is *giving away* its Silver Cloud *Rolls Royce*
Man: And *you* can win it!
Woman: To get all the details
Man: Just *look* for the J & B Rolls Royce contest *poster* at
Woman: Your favorite liquor store or supermarket
Man: The drawing is Aug. 16th.
Woman: You can *also win*
Man: One of twenty-five other prizes, one case each of *J & B!*
Woman: Enter often!
Man: Enter NOW!
Woman: *J & B* gives you *nothing* but the best!!!
Music out

30" RADIO

Man, they gotta be jiving us. J & B is *really* giving away the 1956 silver cloud Rolls Royce? Outta sight.

First you go to your favorite liquor store or supermarket and look for the J & B poster which will give you all the details and tell you how to enter your name to win this fabulous prize. Think of it, one of the greatest cars in the world and it could belong to you!

On August 16th the winner's name will be drawn. The J & B Rolls Royce, the one and only car of its kind in the Virgin Islands.

Man, can't you just see yourself behind that wheel?
Account: J & B
Music: "Simple Songs"
30" TV and Radio spot: "Baby"

Audio

(Mood music under)
Woman: Would *you* like to be a *winner*, baby?
Man: *Sure*, baby.
Woman: Well, . . . *J & B's* got something *special* for *you*, baby.
Man: Yeah??!! An' what's that??
Woman: Just the *J & B Rolls Royce*
Man: No Jive??!
Woman: Uh uh, *the Rolls Royce*
Man: Dig it!!!
Woman: Stop by your favorite liquor store or supermarket for *all* the *details.*
Man: And when's the *day*?
Woman: August sixteenth.
Man: Enter *now*?
Woman: Yeah enter *often. J & B* gives you *nothing* but the *best*!!!
Man: Yeah!!! I seeeeeeee!!!

3. Prior to the issuance of the Notice of Apparent Liability, in a letter of July 16, 1973, licensee stated:

> It is our understanding that the automobile was awarded at a drawing held at the studios of Television Station WBNB–TV, St. Thomas, Virgin Islands and telecast on August 16th, 1972. The name of the winner was drawn from a rotating drum-like container by "Miss Virgin Islands", a young lady who had competed in the 1972 Miss Universe Contest. In addition to the Rolls Royce winner, twenty-five additional parties were awarded a case of J & B Whiskey by the same method of drawing.

4. In response to the Notice of Apparent Liability, licensee requested that the forfeiture be mitigated. In support of its request licensee stated that it had believed the announcements were not improper since they did not on their face indicate a lottery and since all Virgin Islands commercial stations carried them. Licensee requested that the Commission take into account the financial condition of WVWI, and stated that one other station which broadcast the same announcements was notified of apparent liability for forfeiture of $1,000 and another was only reprimanded. Further the licensee stated:

WVWI received total revenues from the carriage of the pertinent J & B spot announcements of slightly less than $450 after payments of agency fees. Information received by WVWI from the advertiser indicates that the net revenues received by the television stations for the carriage of these announcements was slightly in excess of $2,000 each. Thus, imposition of a $2,000 fine on WVWI will result in a loss over and above the revenue it received from carriage of the announcements of $1,550. Whereas the same $2,000 fine imposed on each of the television stations is *less than* the revenue each received from the carriage of these objectionable announcements. Each of the television stations, therefore, will still be able to keep at least some of the revenue they received from carriage of these objectionable spot announcements even after imposition of the fine. WVWI, on the other hand, is being penalized an amount of *more than four times* the revenue it received from this transaction. Under these circumstances, WVWI is clearly being treated in an inequitable manner.

Finally, licensee cited its past good record of service to the community and promised future compliance.

5. We find that all the elements of lottery were present in this promotion: prizes were offered in the form of an automobile and whiskey; consideration was necessary in that participants were required to purchase J & B Scotch; and since the winners were selected at random, chance was present. We also find that in advertisements for J & B Scotch, WVWI broadcast information concerning a lottery on August 7 through 15.

6. We have stated that licensees are expected to exercise special diligence to assure that a contest offered for advertisement is not a lottery, and that the fact that other stations accepted the advertising does not excuse the licensee from compliance. *The University of Florida*, 40 FCC 2d 188 (1973). Licensee's financial condition was considered previously. As for the amount of the forfeiture, it was arrived at after consideration was given to many factors including the seriousness of the violations, the circumstances under which they were committed, their duration, and the financial condition of the licensee compared with other stations committing similar violations. *Laury Associates, Inc.*, 27 FCC 2d 870 (1971). A licensee will not be excused for violations because it promises future compliance. *Executive Broadcasting Corp.*, 3 FCC 2d 699 (1966). Further, licensees are expected to make continued efforts to serve the community to which they are licensed and will not be relieved of liability for violations by the fact that they fulfilled their responsibility to serve their communities. *Esther Blodgett*, 18 FCC 2d 6 (1969). Considering all the circumstances in this case, we are not persuaded to remit or mitigate the forfeiture.

8. In view of the foregoing, IT IS ORDERED, That Thousand Islands Corporation, the licensee of Radio Station WVWI, St. Thomas, Virgin Islands, FORFEIT to the United States the sum of two thousand dollars ($2,000) for violation of Section 1304, Title 18, U.S. Code. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument drawn payable to the order of the Federal Communications Commission. Pursuant to Section 504(b) of the Communications Act of 1934, as amended, and Section 1.621 of the Commission's Rules, an application for mitigation or remission of forfeiture may be filed within thirty days of receipt of this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION.
VINCENT J. MULLINS, *Secretary.*

FCC 74-551

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
UNIVERSAL TELEVISION CABLE SYSTEM, INC., BOROUGH OF DICKSON CITY, PA.	CAC-3047 PA16C
UNIVERSAL TELEVISION CABLE SYSTEM, INC., BOROUGH OF THROOP, PA.	CAC-3159 PA63C
For Certificates of Compliance	

MEMORANDUM OPINION AND ORDER

(Adopted May 29, 1974; Released June 5, 1974)

BY THE COMMISSION:

1. On October 5 and October 18, 1973, respectively, Universal Television Cable System, Inc., filed the above-captioned applications for certificates of compliance to commence operations of 27-channel cable television systems at the Pennsylvania Boroughs of Dickson City and Throop, both located within the Wilkes-Barre-Scranton, Pennsylvania, major television market (#49). Universal proposes to offer the following television broadcast signals:[1]

WNEP-TV (ABC, Channel 16), Scranton, Pennsylvania
WBRE-TV (NBC, Channel 28), Wilkes-Barre, Pennsylvania
WDAU-TV (CBS, Channel 22), Scranton, Pennsylvania
WVIA-TV (Educ., Channel 44), Scranton, Pennsylvania
WOR-TV (Ind., Channel 9), New York, New York
WPIX (Ind., Channel 11), New York, New York
WPHL-TV (Ind., Channel 17), Philadelphia, Pennsylvania

The applications are unopposed. Carriage of the proposed signals is consistent with Section 76.61 of the Commission's Rules, and Universal's franchises, granted August 14 and September 14, 1973, respectively, conform with the requirements of Section 76.31.

2. Universal seeks a waiver of Section 76.251 of the Rules insofar as it requires cable television systems operating in major television markets to maintain separate public, governmental, and educational access channels for each system, and requests that these two systems be permitted to share production facilities and three access channels with four other previously certified systems being served from the same headend.[2] A local origination center, with all necessary equipment and facilities needed for the production of programming will be main-

[1] The Borough of Dickson City has a population of 8,500, and the Borough of Throop has a population of 4,000.

[2] On January 30, 1974, the Commission granted certificates of compliance for 13 cable television systems owned by Universal, including the four with which Universal proposes to share access in the instant application: Old Forge Borough (population 9,522); Taylor Borough (population 6,977); Moosic Borough (population 4,273); and Avoca Borough (population 3,543). *See Universal Television Cable System, Inc.*, FCC 74-98, 45 FCC 2d 403 (1974).

tained at the headend site. Additionally, a fully equipped mobile unit will be made available to the communities to facilitate and encourage the production of programming. In support of the waiver request, Universal argues that the heritage of the residents and the geography of the communities have created an extensive community of interest; the current residents are primarily descendents of Western European immigrants (Welsh, English, Italian, Irish, and Slavonic) whose principal occupation was the mining of coal. The geography of the communities is such that they are virtually indistinguishable, generating an interest in and a reliance upon the hub city of Scranton by the residents; their telephone numbers are listed in the Scranton directory; they frequent the same large department stores, zoo, public park, museum, theaters, and other locations of public activity; they attend the two colleges in the City of Scranton, and the hospitals of Scranton are used by the physicians of the six boroughs as the principal health care facility for their patients. Finally, it is noted that the Boroughs of Throop and Dickson City are in the same school district and that the production facilities to be shared by the communities are in all cases within five miles and are served by excellent access roads.

3. We believe the access proposal offered by Universal is reasonable and consistent with our previous decisions concerning the sharing of access channels and production facilities in new conglomerate systems.[3] In approving Universal's access proposal, we take particular cognizance of the following: since Universal will be providing seven signals on its 27-channel systems, the remaining 20 channels are available for access services, should the demand arise. We note, too, that all of the communities will be within five miles of the origination facilities. The mobile unit will supplement the facilities and aid in making the access channels accessible. As with the four previously certified systems, our certification will extend until March 31, 1977. We shall, at the time Universal applies for recertification, expect it to demonstrate the extent to which its access proposal has been successful and has operated in the public interest.

In view of the foregoing, the Commission finds that a grant of the above-captioned applications and partial waiver of Section 76.251 of the Rules would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Application[s] for Certificate[s] of Compliance" (CAC–3047, CAC–3159), filed by Universal Television Cable System, Inc., for the Pennsylvania Boroughs of Dickson City and Throop ARE GRANTED, and appropriate certificates of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION.
VINCENT J. MULLINS, *Secretary.*

[3] *See, e.g., Universal Television Cable System, Inc.*, FCC 74–98, 45 FCC 2d 403 (1974); *Regional Cable Corp.*, FCC 73–123, 39 FCC 2d 494 (1973); *Saginaw Cable TV Co.*, FCC 73–121, 39 FCC 2d 496 (1973).

FCC 74-556

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of VEGA BAJA BROADCASTING CORP. (WEGA), VEGA BAJA, PUERTO RICO; HAS: 1350 kHz, 500 W, DA-DAY; REQUESTS: 1350 kHz, 500 W, DA-2, U For Construction Permit	File No. BP-19486

MEMORANDUM OPINION AND ORDER

(Adopted May 29, 1974; Released June 4, 1974)

BY THE COMMISSION:

1. The Commission has before it for consideration (i) the above-captioned application; (ii) a petition to deny the application; and (iii) pleadings in opposition and reply thereto.

2. Petitioner in this instance is Arecibo Broadcasting Corporation, licensee of stations WMNT(AM) and WMLD-FM, Manati, Puerto Rico. Manati is located about seven miles from Vega Baja and a grant of WEGA's proposal would result in substantial overlap of the respective nighttime service areas. Thus, since petitioner and WEGA would compete for listeners and revenue, we find that petitioner has standing as a party in interest within the meaning of section 309(d)(1) of the Communications Act of 1934, as amended, and section 1.580(i) of the Commission's rules. *Federal Communications Commission* v. *Sanders Brothers*, 309 U.S. 470, 9 RR 2008 (1940).

3. Petitioner's first allegation is that WEGA is not financially qualified. This defect, however, was remedied by a subsequent amendment filed February 4, 1974. Analysis of the applicant's data indicates that $21,000 will be needed to finance and operate the unlimited-time proposal. This total consists of: equipment, $1,500; engineering, $7,500; legal and miscellaneous, $2,500; and additional operating costs, $9,500. To meet this expense, the applicant has available a cash flow from its existing operation in excess of $40,000 and a $76,000 line of credit from Banco Popular of Puerto Rico. Thus, the Commission finds the applicant financially qualified to construct and operate as proposed.

4. Secondly, petitioner points out that WEGA neglected to file part III of section IV-A of the application form to reflect the percentage changes in the respective program categories necessitated by the increase in total broadcast hours in a typical week's operation. This omission was also remedied by the amendment of February 4, 1974, and the application is now in proper form.

5. Petitioner's final contention is that under the "special circumstances" of this case, WEGA should be required to conduct an entirely

104-041—74——9

new ascertainment of community needs. The applicant made its initial and only ascertainment in 1968 and filed additional data in 1969, prior to the granting of its original construction permit for the new station. Program test authority was granted in November of 1971, but the station was not licensed until February 22, 1973. As a result, WEGA was not required to file a renewal application along with other Puerto Rican stations whose licenses expired on February 1, 1973. Since the license issued to WEGA is not due to expire until early 1976, petitioner argues that if WEGA is not now required to conduct an ascertainment in connection with its application for unlimited-time operation, it need not do so until the latter part of 1975, some five and a half years since its last survey.

6. Although the facts in this case are somewhat unusual, we can find no reason to depart from our normal practice. When a station proposes to change its city of license or substantially increase its service area, our *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650 (1971), requires that a new ascertainment be conducted. On the other hand, when a daytime station seeks fulltime facilities, the *Primer* does not require a new study. There are two reasons for this policy. First, except in extremely rare instances, a station's RSS nighttime limitation contour is far less extensive than its daytime service area. Secondly, as noted in answer 1(d) of the *Primer*, the problems of any given community do not change after sundown. If WEGA had continued to operate as licensed and had not proposed unlimited-time facilities during its initial license period, we would not have called upon the licensee to conduct a new ascertainment irrespective of the fact that the station would have been operating for over five years under its original survey. The fact that it now seeks to operate at night, thereby proposing to bring additional service to an area considerably smaller than it already serves in the daytime, is insufficient reason for the Commission to impose an obligation on the licensee which it would not have otherwise incurred under existing policy during its initial license period.

7. In conclusion, having examined WEGA's proposal, we find the applicant legally, technically, financially, and otherwise qualified to construct and operate as proposed. Moreover, we find that a grant would serve the public interest, convenience and necessity.

8. Accordingly, IT IS ORDERED, That the above application of Vega Baja Broadcasting Corp., IS GRANTED and the petition to deny filed by Arecibo Broadcasting Corporation IS HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-597

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF V.I. INDUSTRIES, INC., LICENSEE OF RADIO STATION WSTA, ST. THOMAS, VIRGIN ISLANDS
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted June 5, 1974; Released June 10, 1974)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE NOT PARTICIPATING.

1. The Commission has under consideration (1) its Notice of Apparent Liability dated August 2, 1973 (mailed August 7, 1973), addressed to V.I. Industries, Inc., licensee of Radio Station WSTA, St. Thomas, Virgin Islands, (2) a response to the Notice of Apparent Liability by the licensee's attorney dated September 4, 1973, and (3) a letter of September 13, 1973 by the licensee adopting its attorney's response.

2. The Notice of Apparent Liability in this proceeding in the amount of $2,000 was issued because of the licensee's apparent violations of Section 1304, Title 18, U.S. Code, in that the licensee broadcast announcements concerning a lottery during 1972 at the times set forth in the attached APPENDIX. Examples of the various announcements broadcast are as follows:

Text 1. Example of five-second spot announcement:
"Win the Silver Cloud Rolls Royce. Win with the winner, J&B."
Text 2. Examples of thirty-second spot announcement:
"Fantastic. Fun . . . Tas . . . Tie! J&B is giving away the 1956 Silver Cloud Rolls Royce. This super car can be yours. It's so easy to do. Go to your favorite liquor store or supermarket and look for the J&B poster giving you instructions for entering your name. If you don't see the poster, ask someone in the store to help you. The drawing takes place on August 16."

And

"Man, they gotta be jiving us. J&B is *really* giving away the 1956 Silver Cloud Rolls Royce? Outta sight. All you gotta do is go to your favorite liquor store or supermarket and look for the J&B poster with all the details. You can enter as often as you want."

And

"Out of all the entry forms, one name will be picked on August 16th and *that*, my friends, is the lucky man who gets to go home with the Rolls Royce. It bends me out of shape just to think about it."
Text 3. Example of fifteen-second spot announcement:
"Once again J&B gives you nothing but the best. The best Scotch Whisky and now the 1956 Silver Cloud Rolls Royce."

3. Prior to the issuance of the Notice of Apparent Liability, licensee, in a letter of July 20, 1973, stated:

WSTA does not know precisely how the automobile was awarded. However, the announcements stated . . . above indicate one name would be drawn on

August 16 and that the drawing would be at random. WSTA is informed that the format for the selection of a winner was followed. The Rolls Royce automobile was awarded to a winner.

Since all media in the Virgin Islands were running copy similar to that shown above and since the advertising agency provided the copy without notification that a purchase was necessary, WSTA was not on notice that a purchase was necessary in order to participate in the give-away. Upon inquiry, it has been determined that the purchase of some J&B Scotch was required to enter the contest.

4. In response to the Notice of Apparent Liability, the licensee replied that it did not dispute the Commission's holding that the program in question constituted a lottery. The licensee stated that the advertising was inadvertently accepted by WSTA and many other Virgin Islands broadcast outlets and requested that the forfeiture be mitigated. In support of the request, licensee stated as follows:

In the past year, WSTA has fallen upon extremely hard times. In order to meet its operation costs, its principal stockholder has been called upon to advance personal funds in excess of $25,000 to keep the station going. Combining its lack of profitability along with the fact that the Commission did not assess a standard forfeiture to all broadcast outlets involved, would seem to WSTA to indicate there is flexibility present here for a reduction in the amount of the forfeiture to WSTA.

Not only has WSTA fallen upon hard times in terms of revenues, but also in terms of management personnel. It is difficult to find a manager who will adjust well to the confinement of Island living. The former manager, native to the Islands, was busy campaigning for the Virgin Islands' Senate at the time these announcements had been run. He is now a permanent member of the Governor's Office as Lieutenant Governor, which governs the Virgin Islands. His replacement died only ten days after taking the WSTA reins. WSTA is continually in search of personnel. It has no day-to-day manager yet. It was thus, all through the period the announcements involved here were run.

The actual account, the subject of the Commission's letter, was not brought to WSTA even by its normal sales efforts. An all night disc jockey brought the order which was scheduled without the usual routine checks because of all of the confusion described plus the unusual nature of the origin of the business.

5. We find that all the elements of lottery were present in this promotion: a prize was offered in the form of an automobile; consideration was necessary in that participants were required to purchase J&B Scotch; and since the winner was selected at random, chance was present. We also find that the licensee violated Section 1304, Title 18, United States Code in broadcasting the announcements for J&B Scotch on August 7, 8, 9, 10, 11, 12, 14, 15 and 16, 1972.

6. The licensee's financial condition was considered previously. A licensee will not be excused because the violations occurred during a period of personnel changes. Licensees are responsible for acts of their employees. *International Broadcasting Corporation*, 19 FCC 2d 793 (1964). Further a licensee will not be excused because advertising is secured through irregular channels. Licensees are responsible for assuring that they operate in accordance with Section 1304, Title 18, United States Code as well as the Communications Act and the Commission's Rules and policies. *The University of Florida*, 40 FCC 2d 188 (1973). Considering the licensee's request and all the circumstances in this case, we are not persuaded to mitigate the forfeiture.

7. In view of the foregoing, IT IS ORDERED, That V.I. Industries, Inc., the licensee of Radio Station WSTA, St. Thomas, Virgin Islands, FORFEIT to the United States the sum of two thousand dollars for violation of Section 1304, Title 18, U.S. Code. Payment of the forfeiture may be made by mailing to the Commission a

check or similar instrument drawn payable to the order of the Federal Communications Commission. Pursuant to Section 504(b) of the Communications Act of 1934, as amended, and Section 1.621 of the Commission's Rules, an application for mitigation or remission of forfeiture may be filed within thirty days of receipt of this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX [1]

August 1 between—
7 and 7:30 a.m.
8 and 8:30 a.m.
10 and 10:30 a.m.
11 and 11:30 a.m.
12 noon and 12:30 p.m.
1 and 1:30 p.m.
2 and 2:30 p.m.
3 and 3:30 p.m.

August 2 between—
7 and 7:30 a.m.
8:30 and 9 a.m.
11 and 11:30 a.m.
12 noon and 12:30 p.m.
1 and 1:30 p.m.

August 3 between—
7 and 7:30 a.m.
8:30 and 9 a.m.
10:30 and 11 a.m.
11 and 11:30 a.m.
12 noon and 12:30 p.m.
1 and 1:30 p.m.
1:30 and 2 p.m.
2:30 and 3 p.m.
3:30 and 4 p.m.
5 and 5:30 p.m.

August 4 between—
7 and 7:30 a.m.
8:30 and 9 a.m.
11:30 and 12 noon
1 and 1:30 p.m.
2:30 and 3 p.m.

August 5 between—
7 and 7:30 a.m.
8 and 8:30 a.m.
10:30 and 11 a.m.
12 noon and 12:30 p.m.
1 and 1:30 p.m.

August 7 between—
8 and 8:30 a.m.
10 and 10:30 a.m.
11:30 and 12 noon
1 and 1:30 p.m.
1:30 and 2 p.m.

August 8 between—
7 and 7:30 a.m.
8 and 8:30 a.m.
10 and 10:30 a.m.
11 and 11:30 a.m.
12 noon and 12:30 p.m.
1 and 1:30 p.m.
2 and 2:30 p.m.
3:30 and 4 p.m.

August 9 between—
7 and 7:30 a.m.
8:30 and 9 a.m.
11 and 11:30 a.m.
12 noon and 12:30 p.m.
1 and 1:30 p.m.

August 10 between—
7 and 7:30 a.m.
8:30 and 9 a.m.
10:30 and 11 a.m.
11 and 11:30 a.m.
12 noon and 12:30 p.m.
1 and 1:30 p.m.
1:30 and 2 p.m.
2:30 and 3 p.m.
3:30 and 4 p.m.
5 and 5:30 p.m.

August 11 between—
7 and 7:30 a.m.
8:30 and 9 a.m.
11:30 and 12 noon
1 and 1:30 p.m.
2:30 and 3 p.m.

August 12 between—
7 and 7:30 a.m.
8 and 8:30 a.m.
10 and 10:30 a.m.
12 noon and 12:30 p.m.

August 14 between—
8 and 8:30 a.m.
10 and 10:30 a.m.
11:30 and 12 noon
1 and 1:30 p.m.
1:30 and 2 p.m.

August 15 between—
7 and 7:30 a.m.
8 and 8:30 a.m.
10 and 10:30 a.m.
11 and 11:30 a.m.
12 noon and 12:30 p.m.
1 and 1:30 p.m.
2 and 2:30 p.m.
3:30 and 4 p.m.

August 16 between—
7 and 7:30 a.m.
8:30 and 9 a.m.
11 and 11:30 a.m.
12 noon and 12:30 p.m.
1 and 1:30 p.m.

[1] All times refer to text 2.

FCC 74-584

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Application of WESTERN UNION TELEGRAPH CO. For Authority To Launch and Operate a Domestic Communications Satellite	File No. 2-DSS-L-74

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

(Adopted June 5, 1974; Released June 7, 1974)

BY THE COMMISSION: COMMISSIONER REID CONCURRING IN THE RESULT AND COMMISSIONER QUELLO NOT PARTICIPATING.

1. The Commission has before it: an application by Western Union Telegraph Company (Western Union) for authority to launch the second of its Westar satellites on or about June 13, 1974 and to position and operate it at 119° west longitude; petitions to deny filed by Comsat General Corporation (Comsat General), American Telephone and Telegraph Company (AT&T), and RCA Global Communications, Inc./RCA Alaska Communications, Inc. (RCA applicants); Western Union's opposition to the petitions to deny; and petitioners' replies.

2. The petitions to deny challenge Western Union's application only insofar as it seeks an orbital location of 119° west longitude. Petitioners point out that this is one of the relatively few locations with good visibility to Alaska and Hawaii, as well as to the contiguous 48 states and Puerto Rico. The Commission has indicated in Docket No. 16495 that service to Alaska will be provided by the RCA applicants and/or Comsat General/AT&T, both of whom have requested this orbital location. Comsat General/AT&T claim that 119° west longitude is particularly important to their proposal to have two satellites west of the Canadian locations, separated by the desired 9° and capable of providing good service to the east coast earth station. The RCA applicants also claim that it is essential to them to have two locations west of the Canadian positions. Petitioners note that Western Union already has a temporary assignment, 99° west longitude, which is capable of serving Alaska and Hawaii even though Western Union is not authorized to serve these points. *Western Union Telegraph Company*, 46 FCC 2d 162 (1974). They assert that Western Union should not be given another westerly assignment, even on a temporary basis, since a move to another location involves a disruption in operations and would undoubtedly be contested by Western Union.

3. In response to petitioners, Western Union states that although it is seeking 119° west longitude, the objections of AT&T could be met by assigning it 123.5°. It further asserts that either location would be useful for purposes of serving Puerto Rico and Hawaii, as well as Alaska, and that it is in the national interest for the first domestic

satellite system to encompass all states and Puerto Rico/Virgin Islands. Comsat/AT&T would not object to the use of 123°.

4. As a preliminary matter we will address the question of orbital spacings. At the time of our various orders in Docket No. 16495 it was thought by the Commission that United States domestic satellites could be spaced three degrees apart in the geostationary orbit to prevent mutual interference and that any one of these satellites had to be five degrees from the Anik satellites of Telesat Canada. Based on current system characteristics, and recent calculations made by the system operators, the National Aeronautics and Space Administration and the Commission's staff, it appears that spacings on the order of four degrees will be required between most of the domestic satellites, and that five degree spacing from the Anik satellites will be satisfactory only if certain of the R.F. carriers are not on the same frequency as the susceptible carriers in the Canadian system. Such frequency coordination with Canada, in our view, will be practicable and is justified in the interest of keeping the satellite spacings as small as possible. In the event that smaller earth station antennas should be authorized, wider spacings may be required.

5. For these reasons, satellite spacings of four degrees, starting five degrees from the Anik satellite location of 104° west longitude will be used by the Commission as a basis for assigning satellite longitudes in the oribtal arc east of the Canadian locations. These spacings are still only a guide. Spacings slightly smaller may be possible in some cases, and larger ones may be required in others, based on actual experience and measurements of satellites as they are manufactured and placed in orbit. Among the uncertainties at this time are the isolation that can be achieved by cross-polarization, the side-lobe levels of earth stations, and the use of small terminals.

6. In our Memorandum Opinion and Order of April 3, 1974 (46 FCC 2d 162) granting Western Union a temporary assignment of 99° west longitude, we made an exception to the policies adopted in Docket No. 16495. As there set forth, our orders in Docket No. 16495 reserved 99° and other more westerly orbital positions capable of serving all 50 states for systems authorized to serve Alaska and/or Hawaii. Western Union is not authorized to serve either point, though it has filed various applications seeking to do so. Our initial domestic satellite authorizations contemplated that Alaska would be served by the RCA applicants and/or AT&T and Hawaii would be served by the system of National Satellite Services, Inc./GTE Satellite Corp. (NSS/GSAT). In view of the pending application of GSAT to utilize the Comsat/AT&T satellites in lieu of the NSS, it is uncertain how many of the authorized satellites it will be necessary to accommodate in the approximately six positions 119° and west.

7. If the GSAT application is granted and NSS decides not to proceed—factors not known now, there would be one or two vacant westerly positions. However, we do not believe it in the public interest or conducive to orderly procedure to make another exception to our policies for Western Union's second satellite. As a prerequisite to the authorization of additional systems to serve Alaska and Hawaii (over and beyond the systems authorized for telephone service), an applicant must show that "it will provide an additional service which should be available to all 50 states on the same system (e.g., interstate television

program transmission) or that it will provide some service on terms and conditions of special benefit to the States of Alaska and/or Hawaii" (Memorandum Opinion and Order in Docket No. 16495, 38 FCC 2d 665, 697). Western Union has not been found to have made such a showing. Moreover, any showing of special benefit should be weighed against the showing of any other claimant to the use of the westerly positions for an additional system. NSS, if it proceeds, plans to offer programming for CATV systems and free service for public broadcasting. Further, we would be reluctant to preempt all the vacant westerly positions and leave no room for the implementation of meritorious proposals by future applicants, except upon a finding that the applicant's service would be of special benefit to Alaska and/or Hawaii. We agree with the statement of Comsat/AT&T that a temporary assignment of a westerly position to an unauthorized applicant is undesirable in that a long move to another location involves a disruption in operations and would very likely be contested.

8. In light of the foregoing, we will assign the Westar II satellite the orbital location 91° west longitude and authorize Western Union to position Westar II at 90° west longitude until NASA's ATS–F satellites vacates 94° west longitude (now scheduled to be in May, 1975). The regular assignment will be 91°, rather than 90°, in order to maintain the 4° satellite spacing guidelines discussed in paragraphs 4 and 5 above. Apart from the temporary occupancy of 94° west longitude by ATS–F, we believe that 91° is preferable to 95° as a permanent assignment, because two adjacent Westar satellites would cause more noise to each other than an intervening Comsat/AT&T satellite would cause to the two Westar satellites. Like the Westar I location at 99°, a satellite positioned at 90° or 91° can see Hawaii, part of Alaska, and the 48 contiguous states. In the event that Western Union is authorized to serve Alaska and neither 99° nor 91° is adequate for this purpose, we can authorize a move to an appropriate location.

9. Accordingly, IT IS ORDERED, That:

(a) The above-captioned application IS GRANTED to the extent reflected herein and Western Union IS AUTHORIZED to launch its second satellite (KS21) as scheduled by NASA, to place it temporarily on station at 90° west longitude and to operate such satellite. This authorization is upon condition that such satellite shall be moved to 91° west longitude within 30 days after ATS–F vacates 94° west longitude.

(b) The assignment of orbital location 91° west longitude and the temporary authorization to use 90° west longitude are subject to change by summary order of the Commission upon 30 days notice and do not confer any right to the use of either orbital location for another satellite.

(c) Western Union IS GRANTED TEMPORARY AUTHORITY to operate the facilities covered by Attachment A to the above-captioned application in connection with the launch, positioning and testing of the satellite.

(d) The relief sought in the petitions to deny filed by Comsat General, AT&T and the RCA applicants IS GRANTED to the extent reflected herein and is otherwise denied.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74D-26

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
WWKY, INC., WINCHESTER, KY.	Docket No. 19748 File No. BPH-7319
DAVID H. GREENLEE, TRADING AS CLARK COMMUNICATIONS CO., WINCHESTER, KY.	Docket No. 19749 File No. BPH-8146
For Construction Permits	

APPEARANCES

Gene A. Bechtel, Esq. and *Eric L. Bernthal, Esq.*, on behalf of WWKY, Inc.; *Mark E. Fields, Esq.* and *Jerrold D. Miller, Esq.*, on behalf of David H. Greenlee, tr/as Clark Communications Company; and *David G. Richards, Esq.*, on behalf of the Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN H. CONLIN

(Issued April 10, 1974; Effective June 6, 1974 pursuant to Section 1.276 of the Commission's Rules)

PRELIMINARY STATEMENT

1. On May 30, 1973, the Commission released an Order (FCC 73-566) which designated for hearing in a consolidated proceeding the following applications: Irvenna Broadcasting Company, Inc. (Irvenna); WWKY, Inc. (WWKY); and David H. Greenlee, tr/as Clark Communications Company (Clark). Each sought a construction permit for an FM station to be operated on Channel 261, 100.1 MHz, with 3 kilowatts power. Irvenna's application was for Irvine, Kentucky and those of WWKY and Clark were for the nearby community of Winchester, Kentucky.

2. At a prehearing conference held on June 27, 1973, counsel for Clark made an oral motion to dismiss Irvenna's application for failure to prosecute. Thereafter the presiding judge received an informal notice from the applicant's counsel that Irvenna did not intend to pursue its application. Clark's motion was granted and Irvenna's application was dismissed with prejudice (Order released August 3, 1973, FCC 73M-899).

3. With elimination of the Irvenna application, the only issue left for determination was which of the remaining proposals would better serve the public interest. A hearing on this question was held on October 2, 1973 and the record was closed on that date. Proposed findings and conclusions limited to comparative coverage were filed by the Broadcast Bureau on October 30, 1973. The applicants filed

proposed findings and conclusions on November 5, 1973 and Clark submitted a reply pleading on November 12.

4. Subsequently, however, the following issues were added to the proceeding by the Review Board (FCC 73R–401, released December 7, 1973):

> To determine, with respect to the application of David H. Greenlee, tr/as Clark Communications Company: (a) the basis of the applicant's proposed salary estimates, whether they are reasonable, and if not, whether the applicant has available sufficient additional funds to meet such costs; and (b) whether in light of the facts so found, the applicant is financially qualified to construct and operate his proposed station for one year.

A hearing conference was held on December 18, 1973, and the hearing itself was convened and completed on January 29, 1974. The record was formally closed by an Order (FCC 74M–139) released February 7, 1974. The Broadcast Bureau and Clark submitted further proposed findings and conclusions on February 28, 1974, and WWKY filed a reply on March 11.

FINDINGS OF FACT

The Community

5. The city of Winchester (population 13,402) is located in north-central Kentucky. It is the county seat and largest community in Clark County (population 24,090).[1] Neither the city nor the county is a part of an Urbanized or Standard Metropolitan Area. There is one broadcast station in the community, WWKY (AM), licensed to WWKY, Inc. A minimum of five primary aural broadcast services (including WWKY) are received day and night.

The Applicants

6. *WWKY.* WWKY, Inc. is a Kentucky corporation formed in November 1960. It acquired the license of radio station WWKY, Winchester, Kentucky in January 1961 and has owned and operated the station since that time. There are 100 shares of common stock of WWKY, Inc. authorized and issued. Of these, 62.5 (84.4%) shares are held by Wilda Horton. Each of her children, Donald J. Horton, Jr., Donna Horton and Jonathan Horton, holds 3.83 shares (5.2% respectively). These 74 shares comprise the total outstanding stock.[2] The officers of WWKY, Inc. are: President, Wilda Horton; Vice President, David E. Griffith; Secretary-Treasurer, Ina Jo Griffith. Its directors are: Wilda Horton, Davids E. Griffith, Ina Jo Griffith, Blake Page and Dorsey P. Curtis.

7. Wilda Horton resides in Lexington, Kentucky, approximately 20 miles west of Winchester. Mrs. Horton does not participate in the day-to-day operation of radio station WWKY, though she confers with the general manager, Mr. Griffith, on a regular basis.

8. David E. Griffith resides in Winchester. He was employed as a salesman for WEKY in Richmond, Kentucky in 1966, and joined the staff of WWKY in June 1966 as sales manager. He has been the gen-

[1] Population data are based on the 1970 Census Report PC(1)A19.
[2] Official notice is hereby taken of WWKY's Section 1.65 statement filed October 30, 1973.

eral manager of radio station WWKY and the vice president of WWKY, Inc. since March 1968, positions to which he devotes full time and attention. Ina Jo Griffith, his wife, has worked full time at radio station WWKY since 1968, performing secretarial, copy writing, bookkeeping and traffic duties. Blake Page resides in Winchester and, as a practicing attorney there, is counsel for WWKY, Inc.

9. WWKY proposes no changes in its organizational relationships in the event its application is granted. Mr. Griffith will serve full time as general manager of both the AM and the FM stations, and Mrs. Griffith will continue as a full-time employee. Mrs. Horton, the only officer or director who is a stockholder, will continue to review the affairs of WWKY, Inc. with Mr. Griffith but she will not be active in the day-to-day operation of either station. Messrs. Page and Curtis will continue to serve as members of the Board of Directors, and Mr. Page will continue to serve as counsel.

10. *Clark.* David H. Greenlee is the sole owner of Clark Communications Company. Born in Knoxville, Tennessee, he has resided in Winchester since 1970. Greenlee has no ownership interest in any medium of communications. However, during the past ten years he has held a number of positions in broadcasting: a cameraman at WJCT–TV, Jacksonville, Florida during the summer of 1963; chief student engineer at WMKY–FM in Morehead, Kentucky from 1964 to 1966; employment in both engineering and on-the-air capacities at WMOR–AM–FM, Morehead, Kentucky during 1966; similar positions at WIRV, Irvine, Kentucky, WEKY, Richmond, Kentucky, and at WEKU–FM in Richmond, Kentucky from 1966 through 1969. He was also employed in the operations and maintenance department of WKYT–TV in Lexington, Kentucky in 1968, and was assistant chief engineer there from November 1969 through September 1971. Mr. Greenlee served on the engineering staff of WWKY from October 1970 until September 1973. He is currently employed as an engineer with the Kentucky Educational Television Network and at the time of the hearing was also working in a technical capacity for station WIXS, Grayson, Kentucky. Mr. Greenlee is a past president and vice president of the Winchester Amateur Radio Club and is also a member of the Clark County Farm Bureau cooperative.

11. Greenlee intends to serve as general manager and chief engineer at the proposed station, devoting approximately 35 hours per week to these responsibilities. He intends also to retain his position with the Kentucky Educational Television Network. To fulfill these commitments Greenlee proposes to spend three hours each weekday morning at the station and to devote 20 hours to its operation on weekends. His work with the ETV network requires his presence from 3:00 p.m. to 11:00 p.m., Monday through Friday.[3]

Past Broadcast Record

12. As previously indicated, WWKY, Inc. has owned and operated an existing station in Winchester since 1961. Over the objection of Clark, the presiding officer allowed into evidence exhibits describing

[3] Greenlee is employed there as a video tape technician. There is no evidence that he exercises any influence over programming or policy determinations.

the past programming of this station on the ground that arguably, at least, it exceeded "the bounds of average performance" [4] and might therefore be relevant to a decision in this case.

13. During the most recent license period a composite week analysis for the station showed the following data:

News—7 hrs. 47 mins.—8.9%
Public Affairs—2 hrs. 46 mins.—3.1%
All Other (except entertainment & sports)—18 hrs.9 mins.—20.7%

In each instance the percentage figures approximated those proposed in its renewal application.

14. WWKY carried a variety of religious, public affairs, instructional, agricultural and other programs. Included were various programs from state government departments, programs from local churches and a daily local interview and talk program, "Around the Town with Kitty Klark" (a 30-minute program). In connection with its news programming, WWKY maintains daily contact with local news sources and regularly carries (by delayed tape) statements and speeches made by local and state figures. WWKY also provides coverage of meetings of important organizations in the area, as well as newsworthy court proceedings. Special programs are broadcast at election time to provide air time for candidates and there is comprehensive coverage of election returns.

15. The station's religious programming is particularly extensive. At least six programs (three daily and three weekly) originate locally; these vary in length from fifteen minutes to one hour. In addition ten or more recorded programs of a religious nature are regularly broadcast, most of them on a weekly basis.

16. Guests on the Kitty Klark program since June 1972 have included persons associated with a wide variety of private and public endeavors, such as the contest for the title "Miss Clark County Fair," a theatre, gardening awards, a new church, medical projects, civic clubs, schools, units of government, charity drives, political candidates and others.

17. In its farm programming, WWKY features reports from agricultural markets and other programming concerning crop-raising, along with farm weather information. During the tobacco market season, WWKY carries special features giving prices, averages, marketing rules and other marketing information. WWKY also carries a report from the County Agent every other Saturday for 15 minutes. WWKY makes its staff and facilities available for writing and production of public service announcements on behalf of organizations, such as Lions Club and Kiwanis Club. In the area of sports programming, WWKY carries substantially all of the basketball and football games of the local high school, as well as day football games of Eastern Kentucky University, located approximately 20 miles from Winchester.

[4] *Policy Statment on Comparative Broadcast Hearings*, 1 F.C.C. 2d 393, 398.

Comparative Coverage

18. Although each applicant proposes to radiate an effective power of 3 kilowatts, because of its higher center of radiation the 1.0 mV/m contour of the Clark proposal would extend beyond and completely encompass that of the WWKY proposal. During the day, all of the area within the proposed 1.0 mV/m contour of each applicant receives at least five primary aural broadcast services. At night, however, within the Clark proposed 1.0 mV/m contour, but outside that of WWKY, there are areas that receive fewer than three, four and five primary aural broadcast services.

19. The total service proposed by each applicant is tabulated below:

Predicted Service within the 1.0 mV/m Contour

	Population	Area (square miles)
Clark	47,152	645.5
WWKY	30,353	410.0
Difference	16,799(+55%)	235.5(+57%)

Within the differential area (i.e., that which would be served by Clark but not by WWKY), the presently available nighttime primary aural broadcast services are as follows:

Available services	Population	Area (square miles)
Two	1,222	40.2
Three	991	16.4
Four	5,518	99.2
Five or more	9,068	79.7

The Financial Issue

20. The financial issue, as specified by the Review Board, sought to determine the basis for Clark's salary estimates, their reasonableness, and whether sufficient funds were available to meet these costs. To meet the issue, Clark filed a petition for leave to amend its application to show that the proposal to purchase certain equipment from CCA had been dropped and that the amount of money allocated for the purchase of studio equipment had been decreased. These changes were being made because Greenlee had recently acquired a complete studio equipment package as payment for work performed for two radio stations [5] and was purchasing an operational transmitter and an antenna with current income from his consulting activities. These acquisitions would result in savings in excess of $5,800. Greenlee also proposed to raise the annual salaries for his two full-time employees from $5,200 to $6,500. The amendment was accepted by an Order (FCC

[5] It was his opinion that the equipment was sufficient to outfit a main studio and a production facility. In this connection it is noted that Greenlee holds a first class license, has served temporarily as chief engineer for radio station WEKY, Lexington, Kentucky and has performed technical services for radio station WWKY where he worked for three years.

74M–115) released January 31, 1974 and evidence supporting the facts recited therein was adduced at the hearing.

21. Greenlee's salary estimates were based on discussions he had with owners, operators and employees of radio stations in the Winchester area. As indicated in the affidavit which was introduced at the hearing, the salary estimates of $6,500 for a program director and a sales manager are commensurate with the salaries of similar management level personnel at radio station WWKY. In addition, Greenlee contacted the general managers of radio stations WBLG and WNKY in Bowling Green and Neon, Kentucky, respectively.

22. The general manager of WNKY, Mr. G. C. Kincer, Jr., in a notarized letter addressed to Greenlee, expressed the belief that the salaries proposed would attract qualified applicants. Kincer's statement was substantiated by A. Randall Hughes in a notarized letter which was written in his capacity as general manager of radio station WBLG. Hughes indicated that since 1971 and while working for various radio stations in Kentucky he had hired highly experienced broadcast personnel for management positions at salaries less than that proposed by Greenlee. He had also been acquainted with or contacted by persons experienced in broadcasting who had served or would be willing to serve as a program director or sales manager in various Kentucky communities at salaries less than that proposed by Greenlee.

23. Deletion of the CCA equipment proposal results in net savings of $3,337; Greenlee's acquisition of studio equipment saves another $2,500. These savings, when considered in conjunction with Greenlee's new salary estimates, increased legal expenses, and previous financial cushion, provide a financial cushion of approximately $5,176 over anticipated construction and first-year operating costs.

CONCLUSIONS OF LAW

1. It is evident that Clark has satisfied the limited financial issue specified by the Board. The acquisition of various items of equipment, the cost of which had originally been included in the applicant's financial estimate, resulted in substantial savings that were thereupon utilized, among other things, to increase the salaries of two full-time employees. From the vantage point of a large and prosperous metropolitan area, Clark's salary estimates still seem rather low, but this aspect of the proposal was tested at the hearing and the record permits no result other than the one reached herein: that the salaries proposed are consistent with the salaries being offered for similar positions in comparable Kentucky communities.[6] Thus, it is concluded that the applicant's proposed salary estimates are reasonable; that sufficient funds are available to meet these costs; and that the applicant is financially qualified.

2. It remains to apply the policies and criteria enunciated in the *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C. 2d 393, to the facts of the case. The primary objectives of the compara-

[6] On the final day of the hearing, counsel for WWKY requested that the record be kept open so that the validity of Clark's salary estimates could be investigated further and rebuttal testimony submitted. The request was granted, but the presiding officer was subsequently advised that no further opportunity for rebuttal would be sought.

tive process are to obtain the best practical service to the public and to achieve a maximum diffusion of control over media of mass communication, *Policy Statement*, at 394. In the present case meeting the first objective calls for an appraisal of (1) the proposed participation in station operations by those with ownership interests; (2) the past broadcast record of WWKY; and (3) the coverage contemplated by the engineering proposals. Meeting the second requires an assessment of the applicants' links with other communications media and their significance in terms of the facility being sought.

3. *Integration of ownership and management.* Clark is plainly to be preferred. Greenlee, the sole owner, will serve as station manager and chief engineer. He intends to devote about 35 hours a week to the station and will be present at least a part of every broadcast day. His participation is enhanced by virtue of his ten years of relevant broadcast experience and the fact that he is a resident of the community. Greenlee's intention to also remain in the employ of the Kentucky Educational Television Network detracts from his proposal, not because it casts doubt on the feasibility of his commitment to the station but because it means that his attention will be divided. His participation, then, is something less than "full time" but is substantial nonetheless. When compared with the absence of any cognizable participation in the proposed station by WWKY's owners a preference for Clark is clearly required.

4. *Past broadcast record.* Clark has no past record in broadcasting. WWKY, Inc. is the long-time licensee of station WWKY, Winchester. The record of that station provides virtually the only basis for the applicant's claim that it should be preferred over Clark under the comparative issue. It is difficult on a paper record [7] and in the absence of more precise standards to determine whether WWKS's record is "unusually good" within the meaning of the *Policy Statement* and thus entitled to positive weight in determining the outcome of this proceeding. Nonetheless, it is the presiding officer's view that the performance of the station has been sufficiently above routine to warrant consideration. The evidence shows a sustained involvement by the station in community affairs and marked attention to what appear to be significant needs and interests of the community. An FM station performing at a similar level of quality would plainly be an asset to the community. In determining which applicant would provide the better "practical service to the public," the past record of WWKY is a factor favorable to that applicant.

5. *Comparative coverage.* Clark will serve the area which WWKY proposes to serve, and also a wider area not served by WWKY. Clark's 1.0 mV/m (primary service) contour embraces an area of 645.5 square miles with a population of 47,152. Of this primary service area, 235.5 square miles with a population of 16,799 will receive service from Clark but not WWKY. This difference is substantial, being more than 50% greater in terms of both area and population. Moreover, parts of the "difference area" now receive as few as two or three services from existing aural broadcast stations. Thus, an area of 40.2 square miles wherein 1,222 persons reside now receives only two aural services.

[7] The evidence in this area consists solely of exhibits.

Clark, but not WWKY, would provide this area with a third service. Another area of 16.4 square miles, with a population of 991, now receives only three services. Clark would provide a fourth service. Other areas now receiving four or five services would get an additional reception service from Clark. In view of the foregoing Clark's proposal represents a significantly more efficient use of the channel.

6. *Diversity of control over media of mass communication.* A "primary objective of the licensing scheme," [8] this factor is again one in which Clark is to be preferred. WWKY, Inc. is the licensee of the only existing broadcast station in Winchester. A grant to WWKY would thus create a situation in which both stations in the community would be under common ownership and control, a result plainly at odds with Commission policy in comparative cases involving initial licensing. Clark, which is unassociated with any other medium of communication (except for Greenlee's employment as a technician by the Kentucky Educational Television Network), is entitled to a clear preference in this area.

7. *Summation.* With the financial issue having been decided in favor of Clark, this case can have only one result. WWKY gamely argues that its past broadcast record is sufficiently strong to overcome Clark's preferences in other areas, but this contention places more weight on that factor than it can properly bear. The service rendered by WWKY has not been without merit, but Clark's better coverage proposal and its substantially superior showing in terms of owner participation are more than sufficient to offset this advantage. And since Clark would bring a new voice to the community while a grant to WWKY would perpetuate the existing broadcast monopoly, Clark's selection is inevitable.

Accordingly, IT IS ORDERED, That, unless an appeal from this Initial Decision is taken by a party or the Commission reviews the Initial Decision on its own motion, in accordance with the provisions of Section 1.276 of the rules, the application of David H. Greenlee, tr/as Clark Communications Company IS GRANTED, and the application of WWKY, Inc. IS DENIED.[9]

FEDERAL COMMUNICATIONS COMMISSION,
JOHN H. CONLIN, *Administrative Law Judge.*

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[8] *Policy Statement, supra,* at 394.

[9] In the event exceptions are not filed and the Commission does not review on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d) of the rules.